SUPREME COURT OF CANADA

CITATION: R. *v.* Sinclair, 2010 SCC 35

DATE: 20101008
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BETWEEN:

Trent Terrence Sinclair
Appellant
and
Her Majesty The Queen
Respondent
- and -
Attorney General of Ontario, Director of Public Prosecutions of Canada,
Criminal Lawyers' Association of Ontario,
British Columbia Civil Liberties Association
and Canadian Civil Liberties Association
Interveners

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: (paras. 1 to 75)	McLachlin C.J. and Charron J. (Deschamps, Rothstein and Cromwell JJ. concurring)
DISSENTING REASONS: (paras. 76 to 122)	Binnie J.
DISSENTING REASONS: (paras. 123 to 227)	LeBel and Fish JJ. (Abella J. concurring)

Trent Terrence Sinclair *Appellant*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Ontario, Director of Public Prosecutions of Canada, Criminal Lawyers' Association of Ontario, British Columbia Civil Liberties Association and Canadian Civil Liberties Association *Interveners*

Indexed as: R. *v.* Sinclair

2010 SCC 35

File No.: 32537.

2009: May 12; 2010: October 8.

Present: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Charter of Rights — Right to counsel — Custodial interrogation — Presence of counsel throughout interrogation — Renewed opportunity to consult counsel — Accused spoke to counsel of choice prior to police interrogation — Repeated requests for further consultation — Incriminating statements made during interrogation — Whether detainee who has been properly accorded right to counsel at outset of detention has constitutional right to further consultations with counsel during course of interrogation — Canadian Charter of Rights and Freedoms, s. 10(b).

After being arrested for murder, S was advised of his right to counsel, and twice spoke by telephone with a lawyer of his choice. He was later interviewed by a police officer for several hours. S stated on a number of occasions during the interview that he had nothing to say on matters touching the investigation and wished to speak to his lawyer again. The officer confirmed that S had the right to choose whether to talk or not, however, he refused to allow S to consult with his lawyer again. He also told S that he did not have the right to have his lawyer present during questioning. The officer continued the conversation. In time, S implicated himself in the murder. At the end of the interview, the police placed S into a cell with an undercover officer. While in the cell, S made further incriminating statements to that officer. S later accompanied the police to the location where the victim had been killed and participated in a re-enactment. Following a *voir dire*, the trial judge ruled that the interview, the statements to the undercover officer, and the re-enactment were admissible. The trial judge found that the Crown had proven their voluntariness beyond a

reasonable doubt, and that the police had not infringed S's rights as guaranteed by s. 10(*b*) of the *Charter*. The Court of Appeal agreed.

Held: The appeal should be dismissed.

Per **McLachlin** C.J. and Deschamps, **Charron**, Rothstein and Cromwell JJ.: Section 10(*b*) of the *Charter* does not mandate the presence of defence counsel throughout a custodial interrogation. Precedent is against this interpretation and the language of s. 10(*b*) does not appear to contemplate this requirement. Moreover, the purpose of s. 10(*b*) does not demand the continued presence of counsel throughout the interview process. In most cases, an initial warning, coupled with a reasonable opportunity to consult counsel when the detainee invokes the right, satisfies s. 10(*b*). However, the police must give the detainee an additional opportunity to receive advice from counsel where developments in the course of the investigation make this necessary to serve the purpose underlying s. 10(*b*).

In the context of a custodial interrogation, the purpose of s. 10(*b*) is to support detainees' right to choose whether to cooperate with the police investigation or not, by giving them access to legal advice on the situation they are facing. This is achieved by requiring that they be informed of the right to consult counsel and, if a detainee so requests, that he or she be given an opportunity to consult counsel. Achieving this purpose may require that the detainee be given an opportunity to re-consult counsel where developments make this necessary, but it does not demand the continued presence of counsel throughout the interview process. There is of course nothing to prevent counsel from being present at an interrogation where all sides consent, as already occurs. The police remain

free to facilitate such an arrangement if they so choose, and the detainee may wish to make counsel's presence a precondition of giving a statement.

A request to consult counsel, without more, is not sufficient to re-trigger the s. 10(*b*) right. What is required is a change in circumstances that suggests that the choice faced by the detainee has been significantly altered, requiring further advice on the new situation, in order to fulfill the purpose of s. 10(*b*). Police tactics short of such a change may result in the Crown being unable to prove beyond a reasonable doubt that a subsequent statement was voluntary, rendering it inadmissible. But it does not follow that the procedural rights granted by s. 10(*b*) have been breached.

Existing jurisprudence has recognized that changed circumstances may result from: new procedures involving the detainee; a change in the jeopardy facing the detainee; or reason to believe that the detainee may not have understood the initial advice of the right to counsel. The categories are not closed. However, additions to them should be developed only where necessary to ensure that s. 10(*b*) has achieved its purpose. The change of circumstances must be objectively observable in order to trigger additional implementational duties for the police. It is not enough for the detainee to assert, after the fact, that he or she needed help, absent objective indicators that renewed legal consultation was required to permit him or her to make a meaningful choice as to whether to cooperate with the police investigation or refuse to do so.

S does not appear to fall into any of the categories where thus far a right to re-consultation has been recognized as necessary to fulfill the purpose of s. 10(*b*). The question is

therefore whether the circumstances, viewed as a whole, indicate that S required further legal advice in order to fulfill the purpose of s. 10(*b*). Developments in the investigation that suggest that the detainee may be confused about his choices and right to remain silent may trigger the right to a renewed consultation with a lawyer under s. 10(*b*). That is not the case here. It is clear from the trial judge's findings of fact that S never had any doubt about the choices the law allowed him and, in particular, his constitutional right to remain silent. S twice spoke with counsel of his choice. Both times, S told the police that he was satisfied with the call. At the beginning of the interview, S said to the officer that he had been told about some of the devices the police might use to obtain information from him, including lying to him, and that he had been advised not to discuss anything important with anyone. Later in the course of the interview, the police repeatedly confirmed that it was his choice whether he wished to speak with them or not. The police did not denigrate the legal advice he had received and repeatedly confirmed that it was his choice whether he wished to speak or not. There were no changed circumstances requiring renewed consultation with a lawyer. No s. 10(*b*) *Charter* breach has therefore been established.

This interpretation of s. 10(*b*) does not give *carte blanche* to the police as contended. This argument overlooks the requirement that confessions must be voluntary in the broad sense now recognized by the law. The police must not only fulfill their obligations under s. 10(*b*), they must conduct the interview in strict conformity with the confessions rule. In defining the contours of the s. 7 right to silence and related *Charter* rights, however, consideration must also be given to the societal interest in the investigation and solving of crimes. Any suggestion that the questioning of a suspect, in and of itself, runs counter to the presumption of innocence and the protection against self-incrimination is clearly contrary to settled authority and practice. The police are charged with

the duty to investigate alleged crimes and, in performing this duty, they necessarily have to make inquiries from relevant sources of information, including persons suspected of, or even charged with, committing the alleged crime. While the police must be respectful of an individual's *Charter* rights, a rule that would require the police to automatically retreat upon a detainee stating that he or she has nothing to say would not strike the proper balance between the public interest in the investigation of crimes and the suspect's interest in being left alone.

Per **Binnie** J. (dissenting): A detainee is entitled to a further opportunity or opportunities to receive advice from counsel during a custodial interview where his or her request falls within the purpose of the s. 10(*b*) right (i.e. to satisfy a need for legal assistance rather than delay or distraction), and such request is reasonably justified by the objective circumstances that were or ought to have been apparent to the police during the interrogation.

In this case, the initial refusal to allow S to consult further with his counsel did not constitute a *Charter* breach. The breach occurred when after several hours or so of suggestions (subtle and not so subtle) and argument the officer confronted S with evidence linking him to the crime and S repeated five times his desire to consult with his counsel before going further. Police use of moral suasion is, of course, absolutely acceptable, but S was clearly concerned (manifested by his five separate requests to consult his lawyer again) whether the lawyer's initial advice (whatever it was) remained valid. S faced a second degree murder charge. It cannot reasonably be said that the 360 seconds of legal advice he received in two initial phone calls before the police began their interrogation was enough to exhaust his s. 10(*b*) guarantee. Given the unfolding of new information up to that point in the interview, S's request to speak again to counsel was reasonable,

and the police refusal of that further consultation was a breach of s. 10(*b*).

What now appears to be licenced as a result of the "interrogation trilogy" — *Oickle*, *Singh*, and the present case — is that an individual (presumed innocent) may be detained and isolated for questioning by the police for at least five or six hours without reasonable recourse to a lawyer, during which time the officers can brush aside assertions of the right to silence or demands to be returned to his or her cell, in an endurance contest in which the police interrogators, taking turns with one another, hold all the important legal cards.

Communication between solicitor and client is the condition precedent to the lawyer's ability to assist. The advice will only be as good as the information on which it is based. In the case of s. 10(*b*), the lawyer cannot function effectively in an informational vacuum without the possibility of even a general idea of the unfolding situation in the interrogation room. Until aware of that situation, the lawyer may be in no position to render — and the detainee may not receive — meaningful assistance beyond what could be accomplished by a recorded message: "You have reached counsel. Keep your mouth shut. Press one to repeat this message." In this case, the evolving situation produced information S's lawyer needed to have to do his job.

In any case, justification for additional consultation(s) must find objective support in factors which would include (but are not limited to): the extent of prior contact with counsel; the length of the interview at the time of the request; the extent of other information (true or false) provided by the police to the detainee about the case during the interrogation, which may reasonably suggest to the detainee that the advice in the initial consultation may have been overtaken by events;

the existence of exigent or urgent circumstances that militate against any delay in the interrogation; whether an issue of a legal nature has arisen in the course of the interrogation; and the mental and physical condition of the detainee to the extent that this is or ought to be apparent to the interrogator.

The detainee's s. 10(*b*) request will be dealt with in the first instance by the police. In deciding whether to give effect to it the police will have to make a judgment call, but such a call is no more difficult than many arising in the course of their work. The police deal routinely with constitutional standards and other aspects of reasonableness, and there is no reason why they should not be capable of treating a demand for further consultation with counsel with the same level of professionalism. No doubt, a truncated interpretation of s. 10(*b*) would be easier for the police to administer. Rights during an interrogation will always be harder to administer than no rights. The *Charter* is framed in general language. Litigation is inevitable. The criminal justice system might well work more smoothly and efficiently from the crime-stopper's perspective if we had no *Charter*, but so long as we do have a *Charter*, s. 10(*b*) like other *Charter* rights should be given a broad interpretation consistent with its purpose. If it takes time to work out its proper amplitude so be it.

Finally, S's subsequent admissions to the undercover officer in the jail cell were part of the same transaction or course of conduct as the statement to the interrogation officer and were thus tainted, because S's reason for confessing in the jail cell was explicitly linked to the fact that he had just given himself up in the interrogation room. The same is true of the re-enactment. Without the initial statement to the interrogation officer, it would not have taken place. This causal connection is sufficient to establish the requisite link. The statement to the undercover officer and the evidence produced by the re-enactment are linked to the earlier breach of s. 10(*b*) and were therefore obtained

in breach of the *Charter*. That evidence should be excluded under s. 24(2) in light of the general presumption of exclusion of unconstitutionally obtained statements.

Per **LeBel**, **Fish** and Abella JJ. (dissenting): S's right to counsel was infringed because the police prevented him from obtaining the legal advice to which he was entitled. His access to legal advice would have mitigated the impact of the police's relentless and skilful efforts to obtain a confession from him. This breach of S's right to counsel went to the core of the self-incrimination interest that s. 10(*b*) is meant to protect. Under our system of criminal justice, the state bears the sole burden of proving the guilt of the accused. This basic precept finds expression in the presumption of innocence and the right to silence. Both rights are constitutionally protected. It follows inexorably that a detainee under police control is under no obligation to cooperate with a police investigation or to participate in an interrogation.

Both a straightforward reading and a purposive interpretation of s. 10(*b*) lend themselves to a broad conception of the right to counsel. The guarantee of "l'assistance d'un avocat" means more than a one-time consultation with counsel, specifically when the brief consultation is followed by a lengthy interrogation, conducted by a skilled and experienced police interrogator.

The right to silence, the right against self-incrimination, and the presumption of innocence work together to ensure that suspects are never obligated to participate in building the case against them. Confronted by bits and pieces of incriminating evidence, conjectural or real, the detainee may be wrongly persuaded that maintaining his or her right of silence is a futile endeavour: that the advice to remain silent originally provided by counsel is now unsound. Through ignorance

of the consequences, the detainee may feel bound to make an incriminatory statement to which the police are not by law entitled. In what may seem counterintuitive to the detainee without legal training, it is often better to remain silent in the face of the evidence proffered, leaving it to the court to determine its cogency and admissibility, and forego the inevitable temptation to end the interrogation by providing the inculpatory statement sought by the interrogators. Access to counsel is therefore of critical importance at this stage to ensure, insofar as possible, that the detainee's rights are respected and to provide the sense of security that legal representation is intended to afford. However, it is also in society's interest that constitutional rights be respected at the pre-trial stage, as doing so ensures the integrity of the criminal process from start to finish. In these circumstances, counsel's advice is not simply a matter of reiterating the detainee's right to silence, but also to explain why and how that right should be, and can be, effectively exercised.

The assistance of counsel is a right granted not only to detainees under s. 10(*b*) of the *Charter*, but a right granted to every accused by the common law, the *Criminal Code*, and ss. 7 and 11(*d*) of the *Charter*. It is not just a right to the assistance of counsel, but to the effective assistance of counsel, and one that this Court has characterized as a principle of fundamental justice. This right has not been granted to suspects and to persons accused of crime on the condition that it not be exercised when they are most in need of its protection — notably at the stage of custodial interrogation, when they are particularly vulnerable and in an acute state of jeopardy.

The right against self-incrimination and the right to silence cannot be eroded by an approach to criminal investigations, and in particular to custodial interrogation, that would favour perceived police efficiency at the expense of constitutionally protected rights. The right to counsel,

and by extension its meaningful exercise, cannot be made to depend on an interrogator's opinion as to its opportunity or utility. The police are not empowered by the common law or by statute, and still less by our Constitution, to prevent or undermine the effective exercise by detainees of either their right to silence or their right to counsel, or to compel them against their clearly expressed wishes to participate in interrogations until confession.

In this case, both S's statement to the undercover officer and his participation in the re-enactment were inextricably linked to his original confession and were therefore obtained in violation of s. 10(*b*) as well.

That evidence should be excluded pursuant to s. 24(2) of the *Charter*. The violation of S's constitutionally guaranteed right to counsel was significant, and not merely a technical breach. It is almost impossible to imagine a case where a *Charter* breach would have a greater impact on the protected interests of an individual. At a time when his freedom hung in the balance, S was denied access to the legal counsel that he desperately required. As a direct result of this unconstitutional deprivation, S relented in the face of unrelenting questioning and incriminated himself. Had he been provided with an opportunity to consult counsel, the outcome would likely have been very different. The impact of the breach, therefore, struck at the core of our most cherished legal protections: the right to silence and the protection against self-incrimination. Finally, the offence at issue here — murder — is of the utmost severity. So too, however, is the right being protected. While society has an interest in the adjudication of a case on its merits, sometimes, as is the case here, that interest will be outweighed by the protection of the most fundamental rights in the criminal justice system.

Accordingly, the evidence should be excluded pursuant to s. 24(2) of the *Charter*.

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[2003] B.C.J. No. 3258 (QL), 2003 CarswellBC 3841. Appeal dismissed, Binnie, LeBel, Fish and Abella JJ. dissenting.

Gil D. McKinnon, Q.C., and *Lisa J. Helps*, for the appellant.

M. Joyce DeWitt-Van Oosten and *Susan J. Brown*, the respondent.

John S. McInnes and *Deborah Krick*, for the intervener the Attorney General of Ontario.

David Schermbrucker and *Christopher Mainella*, for the intervener the Director of Public Prosecutions of Canada.

P. Andras Schreck and *Candice Suter*, for the intervener the Criminal Lawyers' Association of Ontario.

Warren B. Milman and *Michael A. Feder*, for the intervener the British Columbia Civil Liberties Association.

Jonathan C. Lisus, Alexi N. Wood and *Adam Ship*, for the intervener the Canadian Civil Liberties Association.

The judgment of McLachlin C.J. and Deschamps, Charron, Rothstein and Cromwell JJ. was delivered by

THE CHIEF JUSTICE AND CHARRON J. —

I. Overview

[1] This appeal and its companion cases are about the nature and limits of the right to counsel under s. 10(*b*) of the *Canadian Charter of Rights and Freedoms*. The issue is whether a detainee who has been properly accorded his or her s. 10(*b*) rights at the outset of the detention has the constitutional right to further consultations with counsel during the course of the interrogation.

[2] We conclude that s. 10(*b*) does not mandate the presence of defence counsel throughout a custodial interrogation. We further conclude that in most cases, an initial warning, coupled with a reasonable opportunity to consult counsel when the detainee invokes the right, satisfies s. 10(*b*). However, the police must give the detainee an additional opportunity to receive advice from counsel where developments in the course of the investigation make this necessary to serve the purpose underlying s. 10(*b*) of providing the detainee with legal advice relevant to his right to choose whether to cooperate with the police investigation or not. To date, this principle has led to the recognition of the right to a second consultation with a lawyer where changed circumstances result from: new procedures involving the detainee; a change in the jeopardy facing the detainee; or reason to believe that the first information provided was deficient. The categories are not closed.

[3] In this case, the test for a second legal consultation is not met. Before the interview took place, Mr. Sinclair was advised of his right to counsel and twice spoke with counsel of his choice. At the beginning of the interview, he said to the officer that he had been told about some of the devices the police might use to obtain information from him, including lying to him, and that he had been advised not to discuss anything important with anyone. Later in the course of the interview, the police repeatedly confirmed that it was his choice whether he wished to speak with them or not. There were no changed circumstances requiring renewed consultation with a lawyer. We therefore conclude that breach of the right to counsel under s. 10(*b*) of the *Charter* has not been established, and would dismiss the appeal.

II. Facts

[4] The appellant, Mr. Sinclair, was charged with second degree murder in the November 21, 2002 killing of Gary Grice and ultimately convicted by a jury of manslaughter. The events that concern us on this appeal took place following Mr. Sinclair's arrest early in the morning of Saturday, December 14, 2002, by members of the RCMP detachment in Vernon, B.C.

[5] Upon arrest, Mr. Sinclair was advised that he was being arrested for the killing of Mr. Grice, that he had the right to retain and instruct counsel without delay, that he could call any lawyer he wanted, and that a Legal Aid lawyer would be available free of charge.

When asked whether he wanted to call a lawyer, Mr. Sinclair responded: “Not right this second.” He was then taken to the RCMP detachment, with assurances that he would have another opportunity to contact counsel once they got there.

[6] After booking, Mr. Sinclair was again asked whether he wanted to exercise his right to counsel. This time he told the officer, Cpl. Leibel, that he wanted to speak with a lawyer named Victor S. Janicki, whom he had retained to defend him on an unrelated charge. The police placed the call and the appellant spoke with Mr. Janicki by phone in a private room for about three minutes. Cpl. Leibel asked the appellant whether he was satisfied with the call, to which Mr. Sinclair replied: “Yeah, he’s taking my case.”

[7] About three hours later, Cpl. Leibel called Mr. Janicki to find out if he was coming to the police station to meet with the appellant. Mr. Janicki said he would not be attending at the station because he did not yet have a Legal Aid retainer, but he asked to speak with the appellant again by phone. Another three minute phone call ensued, again with the appellant in a private room. And again the appellant told Cpl. Leibel that he was satisfied with the call.

[8] Later that day, Mr. Sinclair was interviewed by Sgt. Skrine for approximately five hours. Before the interview began, Sgt. Skrine confirmed with Mr. Sinclair that he had been advised of and had exercised his right to counsel. The officer also warned Mr. Sinclair that he did not have to say anything and informed him that the interview was being recorded

and could be used in court. Shortly thereafter, as Sgt. Skrine began to ask the appellant innocuous questions about his background and upbringing, Mr. Sinclair stated that he had nothing to say "until my lawyer's around and he tells me what's goin on and stuff, like ... " (Supp. A.R., at p. 3). Sgt. Skrine responded "fair enough", and confirmed that Mr. Sinclair indeed had the right not to speak. Sgt. Skrine also said that, as he understood the law in Canada, Mr. Sinclair had the right to consult his lawyer but did not have the right to have the lawyer present during questioning. The appellant appeared to accept this proposition, and the interview continued with Sgt. Skrine attempting to build trust with Mr. Sinclair while eliciting some preliminary information.

[9] Shortly thereafter, Mr. Sinclair again expressed discomfort with being interviewed in the absence of his lawyer. Sgt. Skrine reiterated to the appellant that he had the right to choose whether to talk or not. He also expressed the view that Mr. Sinclair's right to counsel had already been satisfied by the prior telephone calls. This explanation seemed to satisfy Mr. Sinclair for the time being, and the preliminary questioning continued.

[10] Later, when Sgt. Skrine started to ask questions about the crime scene, telling the appellant for the first time that they knew it was Mr. Grice's blood on the carpet in his hotel room, Mr. Sinclair stated: "Well I choose to say nothing at the moment" (Supp. A.R., at p. 43). Sgt. Skrine stated "Fair enough" and continued to reveal details about the investigation. Shortly after, Mr. Sinclair reiterated that he was "not talking right now" and that he wanted to speak to his lawyer about all this. Sgt. Skrine told him that it was his

decision whether to speak or not. The interview continued in this manner for some time. Altogether, Mr. Sinclair alternately expressed his desire to speak with his lawyer and his intention to remain silent on matters touching his involvement in the killing four or five times. Each time, Sgt. Skrine emphasized that it was Mr. Sinclair's choice to make. On one of these occasions, Mr. Sinclair expressed uncertainty about what he should do, stating the following:

> Just don't know what to do right now. And that's why I say I wanna wait and think and muddle things through my mind and talk to my lawyer and talk to people I ... and you don't seem to understand that either. It's like okay that's fine. I know you're tryin to do your job. And I do think you're doin a good job, it's just I just don't know what to say at the moment. [Supp. A.R., at p. 77]

[11] Eventually, Sgt. Skrine began to get the kind of answers he was looking for. Mr. Sinclair commented: "You already knew all the answers before you even brought me into the room", and he began to describe what transpired between him and Mr. Grice (Supp. A.R., at p. 85). According to the appellant, the two men had been drinking liquor and Mr. Grice had been using cocaine in Mr. Sinclair's hotel room. They were both intoxicated. At one point, Mr. Grice approached the appellant holding a knife. The appellant thought that Mr. Grice wanted money for another fix and reacted by hitting him over the head with a frying pan. A struggle ensued, and the appellant ended up stabbing Mr. Grice several times and slitting his throat. He disposed of the body and the bloodied bedding in a dumpster.

[12] Later, the police placed Mr. Sinclair in a cell with an undercover officer. When

the officer observed that Mr. Sinclair had been under questioning for a long time, Mr. Sinclair responded: "They've got me, the body, the sheets, the blood, the fibres on the carpet, witnesses. I'm going away for a long time but I feel relieved." He explained that he would not have to keep looking over his shoulder for the police.

[13] Mr. Sinclair also accompanied the police to where Mr. Grice had been killed and participated in a re-enactment.

III. Judicial History

A. *Supreme Court of British Columbia (Powers J.), 2003 BCSC 2040 (CanLII)*

[14] At trial, a *voir dire* was conducted to determine the admissibility of Mr. Sinclair's statements on common law and *Charter* grounds.

[15] The trial judge held that the three statements (the initial interview, the exchange with the undercover officer, and the re-enactment) had been proven by the Crown to be voluntary beyond a reasonable doubt. Indeed, he noted that their voluntariness was not seriously contested. They were therefore admissible at common law. On the s. 10(*b*) *Charter* application, the trial judge held that Mr. Sinclair's right to counsel had been satisfied by the telephone calls prior to the interview. The trial judge explained that "once the person has been advised of their rights under Section 10(b), exercised those rights to retain and instruct

counsel, ... the police can then continue to interview them" (para. 115). In the absence of any change in circumstances, such as a change in jeopardy or an indication that the detainee does not understand his rights, the appropriate question that arises where a person's repeated requests for additional contact with counsel have been ignored is whether the detainee's will had been overborne within the meaning of the confessions rule. Section 10(*b*) offers no further protection in such circumstances. The statements were admitted and Mr. Sinclair was convicted of manslaughter.

B. *British Columbia Court of Appeal (Hall, Lowry and Frankel JJ.A.), 2008 BCCA 127, 169 C.R.R. (2d) 232*

[16] On appeal, Mr. Sinclair argued that the trial judge erred in holding that his right to counsel had not been violated. According to Mr. Sinclair, Sgt. Skrine's refusal to facilitate the appellant's repeated requests to speak with his lawyer during the course of the interview constituted a breach of s. 10(*b*). Mr. Sinclair did not contest the trial judge's finding that his statements were voluntary.

[17] Writing for a unanimous Court of Appeal, Frankel J.A. endorsed the trial judge's statement of the law and his application of it in this case. Relying on this Court's recent decision in *R. v. Singh*, 2007 SCC 48, [2007] 3 S.C.R. 405, he stressed that the right to counsel needs to be understood in tandem with the right to silence, which it is meant to help protect. If, as held in *Singh*, there is no right to unilaterally cut off questioning by asserting the right to silence, no such right can be found under s. 10(*b*) either. Frankel J.A. explained:

> The right to counsel is intended to ensure that detainees receive immediate legal advice so that they will be able to make informed choices in their dealings with the police. As discussed in *Hebert* and *Singh*, once a detainee has exercised his or her right to counsel, the police are entitled to use legitimate means to persuade him or her to speak. I see no policy reason for providing a detainee, who does not have the right to terminate an interview by stating "I wish to remain silent", the peremptory right to do so by stating, "I want to talk to my lawyer again." [para. 40]

While special circumstances like a discrete change in jeopardy would require an additional opportunity to consult with counsel, no such circumstances were present in this case. It mattered not, therefore, how many times Mr. Sinclair may have asked to consult with counsel. Mr. Sinclair's appeal was dismissed and his conviction affirmed.

[18] On further appeal to this Court, Mr. Sinclair repeats the broad proposition advanced in the Court of Appeal below that s. 10(*b*) of the *Charter* imposes a duty on the police to discontinue questioning a detainee who has exercised the right to counsel when the detainee indicates a desire to speak with counsel again. He argues further that s. 10(*b*) requires the police to respect a detainee's request to have counsel present during a custodial interrogation.

IV. Analysis

A. *The Wording of Section 10(b) of the Charter*

[19] Section 10(*b*) of the *Charter* states that upon arrest or detention, a person has the right to "retain and instruct counsel without delay" ("*avoir recours sans délai à l'assistance d'un avocat*").

[20] Mr. Sinclair argues that the plain wording of s. 10(*b*) does not restrict the right to retain and instruct counsel to an initial, preliminary consultation. Section 10(*b*) speaks of a right, upon arrest or detention, to "retain and instruct counsel without delay". Although the wording makes clear that the right arises on detention, there is nothing on its face to indicate when the right is exhausted. It is argued that while the English words, "retain and instruct" can plausibly be read to connote a continuing right, the French version of s. 10(*b*) indicates this even more strongly ("*avoir recours sans délai à l'assistance d'un avocat*"). It is argued that the word "*l'assistance*" connotes the right to the ongoing help of a lawyer.

[21] Against these arguments, the Crown submits that the words "on arrest or detention" indicate a point in time, not a continuum. It is true, the Crown concedes, that "retain" and the French "*recours ... à l'assistance*" can be read as suggesting continuity. But against this, the words "without delay" can be read to indicate a discrete period shortly following arrest or detention.

[22] The surrounding text of s. 10 does not greatly assist in resolving the debate on whether s. 10(*b*) confers initial or continuing rights. Section 10(*a*) provides the right on

arrest or detention "to be informed promptly of the reasons therefor". This clearly confers a duty to give the detainee information at a discrete point in time; there is no requirement that the police convey this information more than once, unless the reasons themselves change: *R. v. Evans*, [1991] 1 S.C.R. 869. But the right of *habeas corpus* conferred by s. 10(*c*) is self-evidently a continuing right.

[23] We conclude that the language of s. 10(*b*) does not resolve the issue before us. A deeper purposive analysis is required.

B. *The Purpose of Section 10(b) of the Charter*

[24] The purpose of s. 10(*b*) is to provide a detainee with an opportunity to obtain legal advice relevant to his legal situation. In the context of a custodial interrogation, chief among the rights that must be understood by the detainee is the right under s. 7 of the *Charter* to choose whether to cooperate with the police or not.

[25] The purpose of s. 10(*b*) of the *Charter* and its relationship with the right to silence under s. 7 were stated by McLachlin J. (as she then was) in *R. v. Hebert*, [1990] 2 S.C.R. 151, at pp. 176-77. These rights combine to ensure that a suspect is able to make a choice to speak to the police investigators that is both free and informed:

> Section 7 confers on the detained person the right to choose whether to speak to

> the authorities or to remain silent. Section 10(*b*) requires that he be advised of his right to consult counsel and permitted to do so without delay.
>
> The most important function of legal advice upon detention is to ensure that the accused understands his rights, chief among which is his right to silence. ... Read together, ss. 7 and 10(*b*) confirm the right to silence in s. 7 and shed light on its nature.
>
> The guarantee of the right to consult counsel confirms that the essence of the right is the accused's freedom to choose whether to make a statement or not. The state is not obliged to protect the suspect against making a statement; indeed it is open to the state to use legitimate means of persuasion to encourage the suspect to do so. The state is, however, obliged to allow the suspect to make an informed choice about whether or not he will speak to the authorities. To assist in that choice, the suspect is given the right to counsel. [Emphasis added.]

[26] The purpose of the right to counsel is "to allow the detainee not only to be informed of his rights and obligations under the law, but equally if not more important, to obtain advice as to how to exercise those rights": *R. v. Manninen*, [1987] 1 S.C.R. 1233, at pp. 1242-43. The emphasis, therefore, is on assuring that the detainee's decision to cooperate with the investigation or decline to do so is free and informed. Section 10(*b*) does not guarantee that the detainee's decision is wise; nor does it guard against subjective factors that may influence the decision. Its purpose is simply to give detainees the opportunity to access legal advice relevant to that choice.

[27] Section 10(*b*) fulfills its purpose in two ways. First, it requires that the detainee be advised of his right to counsel. This is called the informational component. Second, it requires that the detainee be given an opportunity to exercise his right to consult counsel. This is called the implementational component. Failure to comply with either of these

components frustrates the purpose of s. 10(*b*) and results in a breach of the detainee's rights: *Manninen*. Implied in the second component is a duty on the police to hold off questioning until the detainee has had a reasonable opportunity to consult counsel. The police obligations flowing from s. 10(*b*) are not absolute. Unless a detainee invokes the right and is reasonably diligent in exercising it, the correlative duties on the police to provide a reasonable opportunity and to refrain from eliciting evidence will either not arise in the first place or will be suspended: *R. v. Tremblay*, [1987] 2 S.C.R. 435, at p. 439, and *R. v. Black*, [1989] 2 S.C.R. 138, at pp. 154-55.

[28] Once informed of his right to consult counsel, the detainee may waive the right, deciding not to avail himself of the opportunity to consult that has been provided. The right to choose whether to cooperate with the police, the basic purpose of s. 10(*b*) has been respected in the event of a valid waiver, and there is consequently no breach.

[29] The s. 10(*b*) right to consult and retain counsel and to be advised of that right supports the broader s. 7 right to silence. However, it is not to be confused with the right to silence. An important purpose of legal advice is to inform the accused about his right to choose whether to cooperate with the police investigation and how to exercise it. Section 10(*b*) is a specific right directed at one aspect of protecting the right to silence — the opportunity to secure legal assistance. A given case may raise both s. 10(*b*) and s. 7 issues. Where it is alleged under s. 7 and the confessions rule that a statement is involuntary because of denial of the right to consult counsel, the factual underpinning of the two inquiries may

overlap: *Singh.* Yet they remain distinct inquiries. The fact that the police complied with s. 10(*b*) does not mean that a statement is voluntary under the confessions rule. Conversely, the fact that a statement is made voluntarily does not rule out breach of s. 10(*b*). It follows that *Singh*, which was concerned with the s. 7 right to silence, does not resolve the issue on this appeal.

[30] Mr. Sinclair argues that the purpose of s. 10(*b*) is broader than this. In his view, accepted by our colleagues LeBel and Fish JJ., the purpose of s. 10(*b*) is to advise the detainee how to deal with police questions. The detainee, it is argued, is in the power of the police. The purpose of s. 10(*b*) is to restore a power-balance between the detainee and the police in the coercive atmosphere of the police investigation. On this view, the purpose of the right is not so much informational as protective.

[31] We cannot accept this view of the purpose of s. 10(*b*). As will be discussed more fully below, this view of s. 10(*b*) goes against 25 years of jurisprudence defining s. 10(*b*) in terms of the right to consult counsel to obtain information and advice immediately upon detention, but not as providing ongoing legal assistance during the course of the interview that follows, regardless of the circumstances.

[32] We conclude that in the context of a custodial interrogation, the purpose of s. 10(*b*) is to support the detainee's right to choose whether to cooperate with the police investigation or not, by giving him access to legal advice on the situation he is facing. This

is achieved by requiring that he be informed of the right to consult counsel and, if he so requests, be given an opportunity to consult counsel.

C. *The Right to Have Counsel Present Throughout the Interview*

[33] Mr. Sinclair submits that s. 10(*b*) entitles a detainee to have a lawyer present, upon request, during the entirety of the interview.

[34] Precedent is against this interpretation of s. 10(*b*). While this Court has never ruled directly on the matter, lower courts appear to be unanimous that no such right exists in Canada: see, e.g., *R. v. Friesen* (1995), 101 C.C.C. (3d) 167 (Alta. C.A.); *R. v. Mayo* (1999), 133 C.C.C. (3d) 168 (Ont. C.A.); *R. v. Ekman*, 2000 BCCA 414, 146 C.C.C. (3d) 346. Most recently, in *Osmond*, the Court of Appeal (*per* Donald J.A.) declined to entertain such a submission on the ground that it would reverse clear authority to the contrary. In *Friesen*, Côté J.A. expressed the prevailing view thus: "We should not (and cannot) change the law of Canada so as to forbid the police to talk to a detained suspect unless defence counsel sits in and rules on each question" (p. 182).

[35] The language of s. 10(*b*) does not appear to contemplate this requirement. Mr. Sinclair relies on an expansive construction of the word "instruct", together with an emphasis on the French "*l'assistance d'un avocat*". He argues that this wording "invites a broad and unrestricted interpretation focused on meeting the needs of [the detainee]

whenever and wherever required" (A.F., at para. 63). While "retain and instruct" and their French equivalent reasonably connote more than a perfunctory consultation prior to interrogation, as discussed above, they do not necessarily imply the continued presence of counsel throughout the interview process.

[36] This returns us to the purpose of s. 10(*b*). As discussed above, it is to inform the detainee of his or her rights and provide the detainee with an opportunity to get legal advice on how to exercise them. These purposes can be achieved by the right to re-consult counsel where developments make this necessary, discussed below. They do not demand the continued presence of counsel throughout the interview process.

[37] Mr. Sinclair argues that other countries recognize a right to have counsel present throughout a police interview (see *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Escobedo v. Illinois*, 378 U.S. 478 (1964)), and that Canada should do the same. He relies on academic commentary. See L. Stuesser "The Accused's Right to Silence: No Doesn't Mean No" (2002), 29 *Man. L.J.* 149, at p. 150.

[38] We are not persuaded that the *Miranda* rule should be transplanted in Canadian soil. The scope of s. 10(*b*) of the *Charter* must be defined by reference to its language; the right to silence; the common law confessions rule; and the public interest in effective law enforcement in the Canadian context. Adopting procedural protections from other jurisdictions in a piecemeal fashion risks upsetting the balance that has been struck by

Canadian courts and legislatures.

[39] Significant differences exist between the Canadian and American regimes. *Miranda* came about in response to abusive police tactics then prevalent in the U.S., and applies in the context of a host of other rules that are less favourable to the accused than their equivalents in Canada. For example, *Miranda* applies only to persons "in custody". Custody, for these purposes, means "'formal arrest or restraint on freedom of movement' [to] the degree associated with formal arrest": *California v. Beheler*, 463 U.S. 1121 (1983), at p. 1125; *Yarborough v. Alvarado*, 541 U.S. 652 (2004). The Canadian understanding of psychological detention triggering s. 10(*b*) is more expansive: *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 44. Moreover, breach of the *Miranda* rule does not prohibit use at trial of the detainee's evidence for the purpose of impeaching the accused's testimony at trial (*Harris v. New York*, 401 U.S. 222 (1971); *Oregon v. Hass*, 420 U.S. 714 (1975)), nor prohibit the introduction at trial of real derivative evidence (*United States v. Patane*, 524 U.S. 630 (2004)). By contrast, Canadian rules on the admissibility of evidence obtained in violation of s. 10(*b*) are much more favourable to the accused: see *R. v. Calder*, [1996] 1 S.C.R. 660; *R. v. Noël*, 2002 SCC 67, [2002] 3 S.C.R. 433, at para. 55; *Grant*, at paras. 116-28.

[40] Additionally, the empirical research on *Miranda* has not reached a definitive conclusion as to the nature or magnitude of its effects. Some have posited that it has had a detrimental effect on law enforcement. Others have vigorously contested such empirical

conclusions. See generally, e.g., P. G. Cassell, "*Miranda*'s Social Costs: An Empirical Reassessment" (1995-96), 90 *Nw. U.L. Rev.* 387; P. G. Cassell and R. Fowles, "Handcuffing the Cops? A Thirty-Year Perspective on *Miranda*'s Harmful Effects on Law Enforcement" (1997-1998), 50 *Stan. L. Rev.* 1055; S. J. Schulhofer, "*Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs" (1996), 90 *Nw. U.L. Rev.* 500. Whatever the merit of these arguments, the existence of such a controversy should signal caution in relying on any empirical conclusions about *Miranda* in departing from our own constitutional traditions.

[41] Moreover, any inferences drawn from the American experience as to the effects on law enforcement of a *Miranda*-type regime must be tempered by the fact that about 80 percent of suspects ultimately waive their *Miranda* rights: see, e.g., P. G. Cassell and B. S. Hayman, "Police Interrogation in the 1990s: An Empirical Study of the Effects of *Miranda*" (1995-1996), 43 *U.C.L.A. L. Rev.* 839; R. A. Leo, "Inside the Interrogation Room" (1995-1996), 86 *J. Crim. L. & Criminology* 266. This has led some authors to assert that *Miranda* provides only illusory protections to the vast majority of individuals who are subjected to custodial interrogation: see C. D. Weisselberg, "Mourning *Miranda*" (2008), 96 *Cal. L. Rev.* 1519; R. J. Allen, "*Miranda*'s Hollow Core" (2006), 100 *Nw. U.L. Rev.* 71; M. A. Godsey, "Reformulating the *Miranda* Warnings in Light of Contemporary Law and Understandings" (2006), 90 *Minn. L. Rev.* 781.

[42] We conclude that s. 10(*b*) should not be interpreted as conferring a constitutional

right to have a lawyer present throughout a police interview. There is of course nothing to prevent counsel from being present at an interrogation where all sides consent, as already occurs. The police remain free to facilitate such an arrangement if they so choose, and the detainee may wish to make counsel's presence a precondition of giving a statement.

D. *The Right to Re-Consult Counsel*

(a) Overview of the Jurisprudence

[43] The authorities suggest that normally, s. 10(*b*) affords the detainee a single consultation with a lawyer. However, they also recognize that in some circumstances, a further opportunity to consult a lawyer may be constitutionally required. These circumstances, as discussed more fully below, generally involve a material change in the detainee's situation after the initial consultation.

[44] The "single consultation" interpretation of s. 10(*b*) was forcefully expressed in *R. v. Logan* (1988), 46 C.C.C. (3d) 354 (Ont. C.A.). After reviewing the authorities, the court stated (at p. 381):

> The clear implication in the judgment of Lamer J. in *Manninen* is that s. 10(*b*) confers the right, upon arrest or detention, to retain, instruct and be instructed by counsel *before* any statements of the accused are elicited. The worlds "*upon* arrest or detention" indicate a point in time, not a continuum. They do not deal with a continuing right to be reinstructed before every occasion on which the

> police obtain a statement from the accused. It is true that "retain" has a connotation of continuity (The Shorter Oxford English Dictionary (1973), p. 1813), but this is with respect to the engagement of services, *i.e.*, the availability and subsequent resort to them when one wants to do so. It does not express a prerequisite to every subsequent elicitation of information. [Underlining added.]

[45] Many courts of appeal have agreed: see *R. v. Wood* (1994), 94 C.C.C. (3d) 193 (N.S.C.A.); *R. v. Gormley* (1999), 140 C.C.C. (3d) 110 (P.E.I.S.C., App. Div.); *R. v. Baidwan*, 2001 BCSC 1412, [2001] B.C.J. No. 3073 (QL), aff'd 2003 BCCA 351, [2003] B.C.J. No. 1439 (QL); *R. v. Bohnet*, 2003 ABCA 207, 111 C.R.R. (2d) 131; *R. v. Anderson*, 2009 ABCA 67, 243 C.C.C. (3d) 134; *R. v. Weeseekase*, 2007 SKCA 115, 228 C.C.C. (3d) 117. See also, to the contrary, *R. v. R. (P.L.)* (1988), 44 C.C.C. (3d) 174; *R. v. Osmond*, 2007 BCCA 470, 227 C.C.C. (3d) 375, *per* Donald J.A., leave to appeal refused, [2008] 1 S.C.R. xii; and *R. v. Badgerow*, 2008 ONCA 605, 237 C.C.C. (3d) 107, *per* Simmons J.A.

[46] This Court has not definitively pronounced itself on the matter, although it has recognized the need for a second opportunity to consult counsel in situations where changed circumstances make this necessary: see *Evans*; *R. v. Burlingham*, [1995] 2 S.C.R. 206; *Black*; *R. v. Prosper*, [1994] 3 S.C.R. 236. We now turn to these cases.

(b) <u>When a Right to Further Legal Consultation Has Been Upheld</u>

[47] Section 10(*b*) should be interpreted in a way that fully respects its purpose of supporting the detainee's s. 7 right to choose whether or not to cooperate with the police investigation. Normally, this purpose is achieved by a single consultation at the time of

detention or shortly thereafter. This gives the detainee the information he needs to make a meaningful choice as to whether to cooperate with the investigation or decline to do so. However, as the cases illustrate, sometimes developments occur which require a second consultation, in order to allow the accused to get the advice he needs to exercise his right to choose in the new situation.

[48] The general idea that underlies the cases where the Court has upheld a second right to consult with counsel is that changed circumstances suggest that reconsultation is necessary in order for the detainee to have the information relevant to choosing whether to cooperate with the police investigation or not. The concern is that in the new or newly revealed circumstances, the initial advice may no longer be adequate.

[49] The police, of course, are at liberty to facilitate any number of further consultations with counsel. In some circumstances, the interrogator may even consider it a useful technique to reassure the detainee that further access to counsel will be available if needed. For example, in the companion case of *R. v. Willier*, 2010 SCC 37, a skilled interrogator commenced the interview by making it clear to the detainee that he would be free at any time during the interview to stop and call a lawyer. The question here is when a further consultation is *required* under s. 10(*b*) of the *Charter*. For the purpose of providing guidance to investigating police officers, it is helpful to indicate situations in which it appears clear that a second consultation with counsel is so required. The categories are not closed. However, additions to them should be developed only where necessary to ensure that

s. 10(*b*) has achieved its purpose.

1. New Procedures Involving the Detainee

[50] The initial advice of legal counsel will be geared to the expectation that the police will seek to question the detainee. Non-routine procedures, like participation in a line-up or submitting to a polygraph, will not generally fall within the expectation of the advising lawyer at the time of the initial consultation. It follows that to fulfill the purpose of s. 10(*b*) of providing the detainee with the information necessary to making a meaningful choice about whether to cooperate in these new procedures, further advice from counsel is necessary: *R v. Ross*, [1989] 1 S.C.R. 3.

2. Change in Jeopardy

[51] The detainee is advised upon detention of the reasons for the detention: s. 10(*a*). The s. 10(*b*) advice and opportunity to consult counsel follows this. The advice given will be tailored to the situation as the detainee and his lawyer then understand it. If the investigation takes a new and more serious turn as events unfold, that advice may no longer be adequate to the actual situation, or jeopardy, the detainee faces. In order to fulfill the purpose of s. 10(*b*), the detainee must be given a further opportunity to consult with counsel and obtain advice on the new situation. See *Evans* and *Black.*

3. Reason to Question the Detainee's Understanding of his Section 10(*b*) Right

[52] If events indicate that a detainee who has waived his right to counsel may not have understood his right, the police should reiterate his right to consult counsel, to ensure that the purpose of s. 10(*b*) is fulfilled: *Prosper*. More broadly, this may be taken to suggest that circumstances that indicate that the detainee may not have understood the initial s. 10(*b*) advice of his right to counsel impose on the police a duty to give him a further opportunity to talk to a lawyer. Similarly, if the police undermine the legal advice that the detainee has received, this may have the effect of distorting or nullifying it. This undercuts the purpose of s. 10(*b*). In order to counteract this effect, it has been found necessary to give the detainee a further right to consult counsel. See *Burlingham.*

(c) The General Principle Emerging from the Cases

[53] The general principle underlying the cases discussed above is this: where a detainee has already retained legal advice, the implementational duty on the police under s. 10(*b*) includes an obligation to provide the detainee with a reasonable opportunity to consult counsel again where a change of circumstances makes this necessary to fulfill the purpose of s. 10(*b*) of the *Charter* of providing the detainee with legal advice on his choice of whether to cooperate with the police investigation or decline to do so.

[54] The cases thus far offer examples of situations where the right of another

consultation arises. However, the categories are not closed. Where the circumstances do not fall into a situation previously recognized, the question is whether a further opportunity to consult a lawyer is necessary to fulfill s. 10(*b*)'s purpose of providing the detainee with advice in the new or emergent situation.

[55] The change of circumstances, the cases suggest, must be objectively observable in order to trigger additional implementational duties for the police. It is not enough for the accused to assert, after the fact, that he was confused or needed help, absent objective indicators that renewed legal consultation was required to permit him to make a meaningful choice as to whether to cooperate with the police investigation or refuse to do so.

[56] As we read his reasons, Binnie J. agrees that allowing further consultations with counsel is constitutionally mandated where developing circumstances make this necessary to serve the purpose underlying s. 10(*b*). However, he would go further and expand the category of cases where this right arises to include all situations where the detainee reasonably requests this in the course of a custodial interview. He then sets out a non-exhaustive list of factors which may provide reasonable grounds for a further consultation for the guidance of police and reviewing courts (para. 106).

[57] As we see it, an approach which would require that questioning be suspended pending a reasonable opportunity to consult further with counsel whenever there is "objective support" to think that the detainee may require further legal advice is not

sufficiently connected to the purpose of ensuring that the detainee remains properly advised about to how to exercise his or her rights. It is assumed that the initial legal advice received was sufficient and correct in relation to how the detainee should exercise his or her rights in the context of the police investigation. The failure to provide an additional opportunity to consult counsel will constitute a breach of s. 10(*b*) only when it becomes clear, as a result of changed circumstances or new developments, that the initial advice, viewed contextually, is no longer sufficient or correct. This is consistent with the purpose of s. 10(*b*) to ensure that the detainee's decision to cooperate with the police or not is informed as well as free. Our colleague's proposed test does not, in our respectful view, capture the circumstances in which additional advice may be required.

[58] Further, this aspect of the test gives the detainee an additional, vaguely described and unnecessary tool to control the interrogation, a tool more likely to be of benefit to the sophisticated than to the vulnerable. Detainees have an absolute right to silence and, therefore, ultimate control over the interrogation. They have the right not to say anything, to decide what to say and when. It must be remembered that the opportunity to consult again with counsel is accompanied by a duty on the police to hold off further questioning until that consultation has taken place or a reasonable opportunity for it to occur has been provided. This may well result in long delays in pursuing the interrogation. A person's *Charter* rights "must be exercised in a way that is reconcilable with the needs of society": *R. v. Smith*, [1989] 2 S.C.R. 368, at p. 385. The purpose of the right to counsel is not to permit suspects, particularly sophisticated and assertive ones, to delay "needlessly and with impunity an

investigation and even, in certain cases, to allow for an essential piece of evidence to be lost, destroyed or [, for whatever reasons, made] impossible to obtain": *Smith*, at p. 385. This, however, is the likely result of Binnie J.'s proposed approach, in our view.

[59] Finally, the proposed test is so vague that it is impractical. No doubt, courts over the years would sort out these problems as best they can. But these efforts will leave a trail of *Charter* motions, appeals and second trials in their wake. In our respectful view, there is no constitutional need for any of this.

[60] The better approach is to continue to deal with claims of subjective incapacity or intimidation under the confessions rule. For example, in *R. v. Oickle*, 2000 SCC 38, [2000] 2 S.C.R. 3, at para. 61, the Court recognized that using non-existent evidence to elicit a confession runs the risk of creating an oppressive environment and rendering any statement involuntary. In *Singh*, the Court stressed that persistence in continuing the interview, particularly in the face of repeated assertions by the detainee that he wishes to remain silent, may raise "a strong argument that any subsequently obtained statement was not the product of a free will to speak to the authorities" (para. 47). However, the cases thus far do not support the view that the common police tactic of gradually revealing (actual or fake) evidence to the detainee in order to demonstrate or exaggerate the strength of the case against him automatically triggers the right to a second consultation with a lawyer, giving rise to renewed s. 10(*b*) rights.

[61] We note that our colleagues LeBel and Fish JJ. express concern that these reasons, together with the majority judgment in *Singh*", "in effect creates a new right on the part of the police to the unfettered and continuing access to the detainee, for the purposes of conducting a custodial interview to the point of confession" (para. 190). While Binnie J. does not endorse their approach, he echoes similar concerns.

[62] We do not agree with the suggestion that our interpretation of s. 10(*b*) will give *carte blanche* to the police. This argument overlooks the requirement that confessions must be voluntary in the broad sense now recognized by the law. The police must not only fulfill their obligations under s. 10(*b*); they must conduct the interview in strict conformity with the confessions rule. On this point, we disagree with Binnie J. that the test for voluntariness in *Oickle* "sets a substantial hurdle to making inadmissible a confession" (para. 92). As explained more fully in *Singh*, the confessions rule is broad-based and clearly encompasses the right to silence. Far from truncating the detainee's constitutional right to silence, its recognition as one component of the common law rule enhances the right as any reasonable doubt on the question of voluntariness must result in the automatic exclusion of the statement. We also disagree with LeBel and Fish JJ. that the number of times Mr. Singh asserted that he had nothing to say during the course of his interview demonstrates that the protection afforded under the confessions rule is meaningless (para. 183). Voluntariness can only be determined by considering all the circumstances. As stated by the majority in *Singh* (para. 53):

> It must again be emphasized that such situations are highly fact-specific and trial judges must take into account all the relevant factors in determining whether or not the Crown has established that the accused's confession is voluntary. In some circumstances, the evidence will support a finding that continued questioning by the police in the face of the accused's repeated assertions of the right to silence denied the accused a meaningful choice whether to speak or to remain silent: see *Otis*. The number of times the accused asserts his or her right to silence is part of the assessment of all of the circumstances, but is not in itself determinative. The ultimate question is whether the accused exercised free will by choosing to make a statement: *Otis*, at paras. 50 and 54.

The trial judge in *Singh* had correctly instructed himself in accordance with the law and conducted a thorough review of all relevant circumstances. As noted by the majority: "Indeed, his analysis of the applicable jurisprudence and review of the relevant facts are impeccable, particularly with respect to the right to silence" (para. 50). In the majority's view, there was no basis to interfere with his ruling.

[63] Our colleagues LeBel and Fish JJ. also assert that our approach is such that the detainee is effectively *forced* to participate in the police investigation. The suggestion is that the questioning of a suspect, in and of itself, runs counter to the presumption of innocence and the protection against self-incrimination. This is clearly contrary to settled authority and practice. In our view, in defining the contours of the s. 7 right to silence and related *Charter* rights, consideration must be given not only to the protection of the rights of the accused but also to the societal interest in the investigation and solving of crimes. The police are charged with the duty to investigate alleged crimes and, in performing this duty, they necessarily have to make inquiries from relevant sources of information, including persons suspected of, or even charged with, committing the alleged crime. While the police must be respectful

of an individual's *Charter* rights, a rule that would require the police to automatically retreat upon a detainee stating that he or she has nothing to say, in our respectful view, would not strike the proper balance between the public interest in the investigation of crimes and the suspect's interest in being left alone.

[64] Finally, LeBel and Fish JJ. assert in different ways that our reasons represent a constitutionalized expansion of police powers. We fail to see how our reasons could be so interpreted. Rather, as explained earlier, we take the settled view to the effect that the right to counsel is essentially a one-time matter with few recognized exceptions, and expand upon this existing jurisprudence by recognizing the right to a further consultation with counsel in any case where a change in circumstances makes this necessary to fulfill s. 10(*b*)'s purpose of providing the detainee with advice in the new or emergent situation. If anything, our reasons broaden the protection available to suspects, and narrow the ambit of police questioning. In our respectful view, it is our colleagues LeBel and Fish JJ.'s interpretation of the scope of s. 10(*b*) that would change the law substantially by recognizing a hitherto unrecognized constitutional right to have counsel present at all times during an interrogation — and do so, we note, by relying on the dissenting opinion in *Singh* which was rejected by the majority of the Court.

[65] We conclude that the principles and case-law do not support the view that a request, without more, is sufficient to re-trigger the s. 10(*b*) right to counsel and to be advised thereof. What is required is a change in circumstances that suggests that the choice

faced by the accused has been significantly altered, requiring further advice on the new situation, in order to fulfill the purpose of s. 10(*b*) of providing the accused with legal advice relevant to the choice of whether to cooperate with the police investigation or not. Police tactics short of such a change may result in the Crown being unable to prove beyond a reasonable doubt that a subsequent statement was voluntary, rendering it inadmissible. But it does not follow that the procedural rights granted by s. 10(*b*) have been breached.

V. Application to the Facts

[66] The question is whether Mr. Sinclair should have been given a second opportunity to consult with a lawyer. Mr. Sinclair does not appear to fall into any of the categories where thus far a right to re-consultation has been recognized as necessary to fulfill the purpose of s. 10(*b*) of giving the detainee access to legal advice with respect to his right to choose whether to cooperate with the police or not. Mr. Sinclair's jeopardy remained the same throughout; he knew from the outset he was facing a charge of murder. The evidence the police told him about did not change the jeopardy he was facing. The police were not requesting his cooperation in a line-up. And as the Court of Appeal held, the police representations as to the strength of the evidence against him do not, without more, raise the need for further consultation with a lawyer.

[67] The only possibility of a renewed right to consult a lawyer lies in an extension of the reasoning in *Prosper* or *Burlingham*. Read broadly, these cases suggest that

developments in the investigation that suggest that the detainee may be confused about his choices and right to remain silent may trigger the right to a renewed consultation with a lawyer under s. 10(*b*). The bottom line in such a situation is whether the circumstances, viewed as a whole, indicate that the detainee required further legal advice in order to fulfill the purpose of s. 10(*b*) of providing legal advice on his choice as to whether to cooperate with the police or not.

[68] The sequence of the interview relevant to this line of inquiry begins with Mr. Sinclair's reaction to Sgt. Skrine's statement that the case against him was "absolutely overwhelming".

[69] To this Mr. Sinclair answered, "I want my lawyer to look through all that". This can be interpreted as a need for legal advice on the actual strength of the case against him.

[70] The interview continued, and Mr. Sinclair continued to ask for legal advice. On one of these occasions, he expressed uncertainty about what to do:

> Just don't know what to do right now. And that's why I say I wanna wait and think and muddle things through my mind and talk to my lawyer and talk to people I ... and you don't seem to understand that either. It's like okay that's fine. I know you're tryin to do your job. And I do think you're doin a good job, it's just I just don't know what to say at the moment. [Emphasis added; Supp. A.R., at p. 77.]

[71] Read broadly and in isolation, these passages arguably support the allegation that Mr. Sinclair may have been confused about his rights and how he should exercise them. However, read in context, it is clear that Mr. Sinclair never had any doubt about the choices the law allowed him and, in particular, his constitutional right to remain silent. The police did not denigrate the legal advice he had received. Rather, they repeatedly confirmed that it was Mr. Sinclair's choice whether or not to speak.

[72] After his confession, and the so-called re-enactment, Mr. Sinclair had an exchange with Sgt. Skrine, which made clear his awareness of the choice he faced and the fact that it went against the advice of his lawyer.

> Sinclair: Lawyer'll probably be mad that I told everything out but it's like whatever. It's like I'm I know when I know I know when is when. It's like ...
>
> Skrine: Yeah. Well you know and that's what I said up front. I mean you're given advice, but at the end of the day you make the decision right?
>
> Sinclair: Yeah.
>
> Skrine: It's your decision to make. Um in this country and you know my opinion is you made the right decision right?
>
> Sinclair: Well now there's closure. [Emphasis added; A.R., at p. 630.]

[73] The following findings of the trial judge confirm that Mr. Sinclair was never confused about his legal options:

2. “I am satisfied by [Mr. Sinclair’s] own comments that he understood his right was to remain silent, to choose whether to speak or not. Nobody ever tried to tell him that he did not have that right” (para. 160).

3. Mr. Sinclair’s counsel advised him not to discuss anything important with anybody, advised about some of the devices the police might use, including a cell plant, and advised not to say anything “because they lie” (paras. 25 and 161).

5. “[T]he police did not make any attempt to denigrate counsel or the advice he had received from counsel. All they did was confirm that ultimately it was Mr. Sinclair’s decision as to whether he said anything or not” (para. 141).

6. “I am satisfied that [Mr. Sinclair] is certainly intelligent enough to understand what his situation was and to make his own choices” (para. 154).

7. “What, in my opinion, happened in this case is that all of the efforts that Sergeant Skrine made to try and encourage Mr. Sinclair to speak were without avail. Mr. Sinclair stood up to them very well” (para. 176).

8. “[U]ltimately when Mr. Sinclair knew that the body had been found, that is when he decided the game was up and he thought he may as well come clean

> and he did so, not because anybody offered him anything, because it relieved him of the pressure he was under, the police investigation, not the interview, and as he said himself, the court might look more kindly on him having cooperated and that is why he decided to do the re-enactment as well" (para. 178).
>
> 9. After he had made his initial statement, Mr. Sinclair told his cell mate (who was in fact an undercover police officer): "They've got me, the body, the sheets, the blood, the fibres on the carpet, witnesses. I'm going away for a long time but I feel relieved" (para. 40).

[74] We conclude that Mr. Sinclair's claim that his s. 10(*b*) *Charter* rights were infringed has not been made out.

VI. Disposition

[75] We would dismiss the appeal.

The following are the reasons delivered by

BINNIE J. —

[76] This appeal addresses the protection of a detainee's civil liberties while under

police interrogation. It is the third in a series of recent cases that have dealt firstly with the rule governing the voluntariness of confessions obtained by the police, and secondly (in the next appeal) with a detainee's ability to insist on his or her right to silence and non-cooperation with the investigation. Today's decision completes the trilogy by interpreting narrowly the guarantee in s. 10(*b*) of the *Canadian Charter of Rights and Freedoms* of the right of a detainee upon arrest or detention "to retain and instruct counsel" (or, in the French text, "*d'avoir recours sans délai à l'assistance d'un avocat*").

[77] The merits of each of the three cases in this "interrogation trilogy" are open to reasonable debate and disagreement, but when the decisions are read together the resulting latitude allowed to the police to deal with a detainee, who is to be presumed innocent, disproportionately favours the interests of the state in the investigation of crime over the rights of the individual in a free society, in my view.

[78] Many confessions obtained in extended police interrogations are true, but too many are not. The Ontario Court of Appeal recently dealt with the case of Romeo Phillion who, in 1972, confessed to a murder while in custody on a robbery charge then recanted — he was jailed for 30 years until the conviction was overturned and sent back for a new trial. Such cases signal caution when approaching the rules governing police interrogations.

[79] The s. 10(*b*) right to counsel, above all, is "designed to ensure that persons who are arrested or detained are treated <u>fairly</u> in the criminal process" (emphasis added),

Clarkson v. The Queen, [1986] 1 S.C.R. 383, at p. 394, repeated in *R. v. Bartle*, [1994] 3 S.C.R. 173, at p. 191. In interpreting s. 10(*b*), the courts need to take a long-term view of the reputation and integrity of our justice system rather than focussing on short-term results at the police station.

Overview

[80] My colleagues the Chief Justice and Charron J. take the position that in general and for most practical purposes the effect of s. 10(*b*) is more or less spent once the lawyer has advised the detainee *before* the commencement of the police interrogation to keep his or her mouth shut. They concede that a further consultation may be required in "*changed* circumstances", but in my view s. 10(*b*) may also be engaged by the *evolving* circumstances of the interrogation. My disagreement with the majority essentially relates to the conditions necessary for a defence lawyer to provide *meaningful* assistance to a client in trouble with the law. In my view, the detainee is entitled to a further opportunity or opportunities to receive advice from counsel during a custodial interview where the detainee's request falls within the purpose of the s. 10(*b*) right (*i.e.* to satisfy a need for legal assistance rather than delay or distraction) and such request is reasonably justified by the objective circumstances, which were or ought to have been apparent to the police during the interrogation, as will be discussed.

[81] The detainee's s. 10(*b*) request will be dealt with in the first instance by the

police. In deciding whether or not to give effect to it, the police will have to make a judgment call, but such judgment calls are no more difficult than many arising in the course of police work. I give as an example the difficult area of police common law powers. In the absence of some statutory authority, the police regularly have to assess the extent and the limits of their powers not previously recognized at common law. Such powers are framed in very general language: *R. v. Dedman*, [1985] 2 S.C.R. 2. It seems to me inconsistent with the Crown's enthusiastic support of previously unrecognized common law police *powers* for the Crown to insist that the police are not capable of sorting out their *responsibilities* framed in similarly general language. In both cases, it is the police who make the initial difficult determination — not the judges. Eventually, of course, it is the judge who will determine if the police got it right.

[82] I would decline to adopt the appellant's more ambitious submission that s. 10(*b*) requires the presence, upon request, of defence counsel during a custodial interrogation.

[83] My colleagues the Chief Justice and Charron J. acknowledge that there may be a need for further consultation if there is a change in the legal jeopardy confronting the detainee. Equally important, however, will be the detainee's belated appreciation in many cases of his or her *existing* jeopardy as the interrogation develops in ways that were not — and could not be — anticipated at the outset during the initial consultation with counsel. In the appellant's case, for example, the police let drop various bits of information , some true and some false, over a five-hour period to hammer into his head what they described as an

"overwhelming case" proving his guilt, which ostensibly rendered futile his continuing non-cooperation. Police use of moral suasion is, of course, absolutely acceptable, but the appellant was clearly concerned (manifested by his five separate requests to contact his lawyer again) whether the lawyer's initial advice (whatever it was) remained valid. The evolving situation produced information the lawyer needed to have to do his job (to provide "*l'assistanc*e"). The appellant faced a second degree murder charge. It cannot reasonably be said, in my view, that the 360 seconds of legal advice he received in two initial phone calls before the police began their work was enough to exhaust his s. 10(*b*) guarantee.

[84] The majority decision limits the purpose of s. 10(*b*) to "supporting the detainee's s. 7 right to choose whether or not to cooperate with the police investigation" (para. 47). This, with respect, excessively conflates the right to counsel with the right to remain silent, and results in an unduly impoverished view of "*l'assistance d'un avocat*"; it belies the liberal and generous interpretation of *Charter* rights so often trumpeted in our jurisprudence. The majority view tightens the noose around s. 10(*b*) to the point where taken together with the Court's other recent pronouncements on police interrogations, the police are allowed more power over the detained individual than the *Charter* intended them to have.

What are Defence Counsel For?

[85] A detainee needs to "retain and instruct counsel" because the law is a complicated place, and the stakes may be high (certainly in a second degree murder charge).

The detainee is isolated and in a position of vulnerability. The *Charter* recognizes that in the interest of fairness the detainee is entitled to help (or "*l'assistance d'un avocat*") not only in relation to the content of his or her rights but on how to exercise those rights in dealing with the authorities: *R. v. Manninen*, [1987] 1 S.C.R. 1233; *R. v. Ross*, [1989] 1 S.C.R. 3; and *R. v. Hebert*, [1990] 2 S.C.R. 151. There is a corresponding duty imposed on the police to respect the s. 10(*b*) right.

[86] The appellant already knew from the standard police warning that he need say nothing and that whatever he said might be recorded and used in evidence. The police interrogator, Sgt. Skrine, told the appellant on more than one occasion that he did not have to say anything. It cannot be correct to limit the role of defence counsel under s. 10(*b*) simply to echo what the police have already said and to urge silence regardless of what may emerge in the course of the interrogation (plus perhaps a few hypothetical examples of what *may* occur during the forthcoming encounter with the police). As the Ontario Criminal Lawyer's Association points out, this much could be accomplished by a recorded message:

> You have reached counsel. Keep your mouth shut. Press one to repeat this message. [transcript, p. 22]

[87] The role of counsel at this stage of the investigation is to help put the detainee in a position to navigate his or her legal problems with the informed capacity the detainee could muster alone if he or she possessed the requisite legal knowledge and experience. The

choice whether or not to cooperate with the investigation is up to the detainee — not the lawyer — but it should be an informed choice. This does not give the lawyer access to places he or she has no right to be (such as the interrogation room in a police detachment), but it should certainly allow the detainee more than a preliminary piece of advice prior to any questioning, at which point the detained person may have a very flawed understanding of what the police are up to.

[88] Communication between solicitor and client is the condition precedent to the lawyer's ability to assist. The advice will only be as good as the information on which it is based. This is why the Court has elevated solicitor-client privilege to being "as close to absolute as possible": *R. v. McClure*, [2001] 1 S.C.R. 445, at para. 35. It is hardly consistent with this emphasis on the *essential* nature of the free flow of information between a lawyer and a client to hold that in the case of s. 10(*b*), the lawyer can function in an informational vacuum without the possibility of even a general idea of the unfolding situation in the interrogation room.

The Interrogation Trilogy

[89] The Crown seems to conceive of the police interrogation as an endurance contest between the detainee, who starts off with the benefit of the standard police warning and generic advice from his or her lawyer (presumably to refuse to cooperate — what else can the lawyer advise at that outset?) and, on the other hand, an experienced police interrogator

who wants to cajole and manoeuvre and wear down the detainee into making incriminating statements and, if possible, a full confession.

[90] It bears repeating that persons detained or arrested may be quite innocent of what is being alleged against them. Canada's growing platoon of the wrongfully convicted, including the by now familiar roll call of Donald Marshall, David Milgaard, Guy-Paul Morin, Thomas Sophonow, Ronald Dalton, Gregory Parsons, Randy Druken, and others attest to the dangers of police tunnel vision and the resulting unfairness of their investigation. See *The Lamer Commission of Inquiry Pertaining to the Cases of: Ronald Dalton, Gregory Parsons and Randy Druken*, by the Right Honourable Antonio Lamer (St. John's, 2006), at p. 171-73. Convinced (wrongly) of the detainee's guilt, the police will take whatever time and ingenuity it may require to wear down the resistance of the individual they just *know* is culpable. As this Court recognized in *R. v. Oickle*, [2000] 2 S.C.R. 3, innocent people are induced to make false confessions more frequently than those unacquainted with the phenomenon might expect (paras. 34-45).

[91] Canadian society has determined that it is in the long-term interest of the administration of justice to provide the assistance of counsel at this early stage however inconvenient it may appear in the short term. That is a policy decision incorporated in s. 10(*b*) of the *Charter* and our job is to give it full effect.

[92] Yet, in their endurance contest with the detainee, the police are now given three

trump cards. The first is *Oickle* itself, which sets a substantial hurdle to making inadmissible a confession on the basis of involuntariness. The second is *R. v. Singh*, [2007] 3 S.C.R. 405, which allows the police to prolong the endurance contest despite repeated assertions of the right to silence by the detainee and the frequently expressed desire to return to his cell. And now we have the present appeal which denies the detainee even a "second" consultation with counsel regardless of the length of the interrogation, unless there is a significant change of circumstances, which in the majority view does not include the unfolding information disclosed by the police to the detainee in the course of the investigation, however critical such information might be to the correctness of the legal advice initially provided, or to the need for further advice.

[93] *Oickle* was the case of a pyromaniac who confessed in the course of a six hour police interrogation to setting 7 of alleged 8 fires in the vicinity of Waterville, Nova Scotia. At issue was the admissibility of his confession, and in particular the scope of the common law rules related to voluntariness. The case is rightly seen as setting a high barrier to exclusion. Members of the Court agreed on the applicable legal principles but divided 8-1 on the application of the law to the facts. As to the legal principles, Iacobucci J. noted that beyond the traditional exclusionary doctrines of oppression and inducements (which are "primarily concerned with reliability") the law governing confessions also protects "a broader conception of voluntariness that focuses on the protection of the accused's rights and fairness in the criminal process" (citations omitted) (para. 69 (emphasis added)). That said, the Court also emphasized "society's need to investigate and solve crimes" (para. 33) and

reference was made (twice) to the *dictum* of Lamer J. that "the investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules": *Rothman v. The Queen*, [1981] 1 S.C.R. 640, at p. 697.

[94] On the facts of *Oickle* the majority (Arbour J. dissenting) concluded that the confession was made voluntarily despite the majority's recognition that the police had minimized the seriousness of the crimes (para. 77), made offers of psychiatric help (though not as a *quid pro quo* for the confession) (para. 78), and suggested that it might be necessary to administer a polygraph test to Mr. Oickle's fiancée to determine whether she was involved in setting fires but, seemingly, not if Mr. Oickle himself were to confess (para. 84). The police pretended that the results of a failed polygraph test were "infallible" (para. 95), and jumped into their persistent questioning of Mr. Oickle immediately after informing him that he had "failed" the polygraph test (para. 101).

[95] On the other hand, the police questioning was courteous and Mr. Oickle was told on at least two occasions *before* his confession that he was free to leave the interrogation (which took place in a motel room) if he wished. The majority held that the police conduct was not necessarily incompatible with Mr. Oickle, in the end, making a *voluntary* confession, as the trial judge had concluded. It was a close case but the points made by the defence, taken in the context of the interrogation as a whole, did not in the view of the majority warrant setting aside the finding of voluntariness by the trial judge to whom deference was owed. A lesson to be drawn from *Oickle*, in my view, is that while the legal

principles are comprehensive and fair, in the absence of egregious circumstances the Crown will be able to establish "voluntariness" without great difficulty when that is the specific issue before the Court.

[96] The second trump card for the police is the majority judgment in *Singh*. Singh was charged with second degree murder when a stray bullet hit and killed an innocent bystander outside a pub. The issue was identification of the shooter. Under interrogation by the police, Singh was not permitted to return to his cell or otherwise bring the lengthy questioning to a close despite his assertion of his right to silence on 18 different occasions. The majority emphasized "the critical balancing of state and individual interests" (para. 7) and observed that "the individual's right to remain silent . . . does not mean that a person has the right <u>not to be spoken to</u> by state authorities" (para. 28 (emphasis in original)). Accordingly, Charron J. for the majority concluded that "where a statement [of the detainee] has survived a thorough inquiry into voluntariness, the accused's *Charter* application alleging that the statement was obtained in violation of the pre-trial right to silence under s. 7 <u>cannot</u> succeed" (para. 8 (emphasis added)). Nevertheless, Charron J. noted that the "right to silence and the right to counsel are not the same" (para. 43).

[97] So now we come to the right of counsel. It seems the police are to be given a third trump card. The detainee is not to be entitled to "*l'assistance d'un avocat*" after obtaining preliminary advice (presumably being advised to refuse to cooperate), unless there are changed circumstances such as "[n]on-routine procedures, like participation in a line-up

or submitting to a polygraph [test that would] not generally fall within the expectation of the advising lawyer at the time of the initial consultation" (para. 50), or a change in legal jeopardy (para. 51), or an indication that a detainee "who has waived his right to counsel may not have understood his right", or "if the police undermine the legal advice that the detainee has received" (para. 52). Although these categories are not "closed", it is clearly stated that "the common police tactic of gradually revealing (actual or fake) evidence to the detainee in order to demonstrate or exaggerate the strength of the case against him" does not "automatically trigger[] the right to a second consultation with a lawyer, giving rise to renewed s. 10(*b*) rights" (para. 60). In my view, we are not talking here of "renewed" or revivified s. 10(*b*) rights. Until the lawyer is aware in at least a general way of the unfolding case being put to his or her client the lawyer may be in no position to render — and the detainee may not receive — "*l'assistance d'un avocat*" in any meaningful sense.

[98] What now appears to be licenced as a result of the "interrogation trilogy" is that an individual (presumed innocent) may be detained and isolated for questioning by the police for at least five or six hours without reasonable recourse to a lawyer, during which time the officers can brush aside assertions of the right to silence or demands to be returned to his or her cell, in an endurance contest in which the police interrogators, taking turns with one another, hold all the important legal cards.

[99] In *Oickle* and *Singh*, and again in this case, the majority opinion emphasizes the important societal interest in resolving crimes. This, of course, is a very valid consideration,

but society also intends crimes to be solved in a framework that respects civil liberties and the fairness of the justice system: *R. v. Black*, [1989] 2 S.C.R. 138; and *R. v. Brydges*, [1990] 1 S.C.R. 190. This includes "*l'assistance d'un avocat*". For reasons already given, I do not believe the majority approach in this case reaches the threshold of meaningful assistance.

The Appellant's More Expansive Approach to Section 10(*b*)

[100] The appellant would interpret s. 10(*b*) to give the lawyer a place in the interrogation room. This may be of interest to rich people (as Legal Aid across the country is in no position to fund such a service), but it is not clear what role the lawyer would play. Would the lawyer participate actively by vetting and objecting to questions and demanding "clarifications" or sit there like the proverbial potted plant? The former role risks bringing the tactics of the courtroom into the preliminaries of a police interrogation. There would be no judge present to referee clashes between the defence lawyer and the police interrogator (who might then understandably complicate matters further by involving a Crown Attorney).

[101] The appellant invokes *Miranda v. Arizona*, 384 U.S. 436 (1966), at p. 469, where the U.S. Supreme Court adopted the sweeping proposition:

> The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation

> is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. [Emphasis added.]

While LeBel and Fish JJ. say that they "are not advocating the adoption of the American rules under *Miranda*" (para. 201), they are clear in their view that "early fears" raised by *Miranda* proved to be "unfounded" (para. 199). Whatever may be my colleagues' eventual position (if any) on having counsel present during custodial interrogations, my own view is that adoption of the *Miranda* rule would seriously overshoot the purpose of s. 10(*b*) in the Canadian context, with its different structure of checks and balances. The need for caution not to overshoot the purpose of s. 10(*b*) was emphasized in a somewhat different context by Lamer J. in *R. v. Smith*, [1989] 2 S.C.R. 368, at p. 385:

> This limit on the rights of an arrested or detained person is essential because without it, it would be possible to delay needlessly and with impunity an investigation and even, in certain cases, to allow for an essential piece of evidence to be lost, destroyed or rendered impossible to obtain. The rights set out in the *Charter*, and in particular the right to retain and instruct counsel, are not absolute and unlimited rights. They must be exercised in a way that is reconcilable with the needs of society. An arrested or detained person cannot be permitted to hinder the work of the police by acting in a manner such that the police cannot adequately carry out their tasks. [Emphasis added.]

No doubt a defence counsel sitting mute in the interrogation room would be better informed than one who is excluded, but the potential "to delay needlessly and with impunity" cannot be doubted by anyone who has experienced the disruptive force of even a moderately aggressive lawyer in a civil examination for discovery (a proceeding that is also un-

refereed). Of course, the detainee (unlike the civil litigant) has a right to silence, but there is no corresponding obligation of silence placed on defence counsel. My colleagues LeBel and Fish JJ. rightly observe that police interrogations in a criminal case are not analogous to a civil examination for discovery (para. 173). Yes, the settings are different, but the potential for disruption is comparable.

[102] I do not suggest defence counsel would deliberately abuse a right of access. I say only that inviting them into the interrogation would, in my view, interpret s. 10(*b*) rights in a way that would excessively undermine the ability of the police to "adequately carry out their tasks".

[103] Of course, nothing prevents Parliament from regulating the presence of counsel at a police interrogation, but in jurisdictions where this has been done the legislature has generally taken care to spell out the applicable circumstances, so *e.g.* the Australian Commonwealth *Crimes Act 1914*, s. 23G and s. 23L; the New South Wales *Law Enforcement (Powers and Responsibilities) Act 2002*, s. 123; the Queensland *Police Powers and Responsibilities Act 2000*; the English *Police and Criminal Evidence Act 1984*, c. 60, ss. 58 and 66; and related Practice Codes (including *Code C - Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers*), and the New Zealand *Criminal Justice and Public Order Act 1994*, c. 33. Our Parliament and/or the provincial legislatures have not seen fit to introduce similar measures within their respective areas of jurisdiction.

Undershooting the Section 10(*b*) Right

[104] That said, I believe the majority view expressed by the Chief Justice and Charron J. *under*shoots the right. Their interpretation presupposes that a detainee is faced with a stark binary choice between cooperation and non-cooperation, whereas a properly informed detainee may choose to cooperate with the police in whole or in part on some issues but not on others. A lawyer's "one size fits all" instruction to a detained individual to keep quiet and decline to cooperate may turn out to be terrible advice. As more information is put to the detainee in the course of the interrogation regarding the date, time, and circumstances of the offence, for example, it may emerge that he has an alibi but he will fail to disclose it — because the lawyer told him over the phone to say nothing — despite the fact it would be in the detainee's interest to make such disclosure immediately. It may turn out — by way of another example — that there are a number of co-accused, in which case offering some additional information to lay the basis for an exculpatory "cutthroat" defence may be preferable to silence. Other facts may come to light giving the detainee a new interest in providing an explanation where previously the detainee declined to cooperate. There will be many matters unknown to the lawyer (and perhaps to the detainee) in their initial conversation. Preliminary advice might provide a snapshot of the applicable law and is, of course, a good start, but it hardly discharges the detainee's right to meaningful legal "assistance".

[105] There exists an intermediate position that would allow the detainee *reasonable* access to legal advice from time to time in the course of a police interrogation (which in this case, as stated, lasted about five hours) without defence counsel being actually present in the interrogation room. The Crown argues that any such approach would create difficult issues of line drawing for police interrogators — when should further consultation be allowed? When can it be delayed? How frequently is "reasonable"? The fact is, however, that unless the detainee is to have a constitutional right unilaterally to stop police questioning at any time merely by indicating a wish to speak to counsel (again) — a position which in my view tilts the balance too far against the community interest in law enforcement — it is inevitable that the police are going to have to make the reasonableness judgment in the first instance. I do not see this as deeply problematic. Police deal with "reasonableness" issues all the time. It is one of the organizing principles that govern their professional work. Various factors can provide guidance, as will be discussed. What is not acceptable, in my view, is to read down the s. 10(*b*) right for the purpose of making it easier for the police to administer it.

Grounds for Further Consultation

[106] What gives grounds for a further consultation will depend on the evolving circumstances. The police are not, in my opinion, required to shut down their interrogation simply because the detainee expresses a desire to consult again with counsel as seemingly advocated by my colleagues LeBel and Fish JJ. (para. 177). On the other hand, the need for

a further consultation (and thus a suspension but not a termination of the interrogation) may arise, I believe, in circumstances beyond those contemplated by my colleagues the Chief Justice and Charron J. I accept that the detainee's request must be for the purpose of the s. 10(*b*) right — *i.e.* related to the need for *legal* assistance — and not simply to delay or distract from the sort of police interrogation approved in *Oickle* and *Singh*. Moreover, justification for such additional consultation(s) must find objective support in factors which would include (but are not limited to):

1. The extent of prior contact with counsel. Was it an extended consultation or a cursory telephone call?

2. The length of the interview at the time of the request. A request made after an hour of questioning may carry more weight than one made as soon as the questioning begins.

3. The extent of other information (true or false) provided by the police to the detainee about the case during the interrogation, which may reasonably suggest to the detainee that the advice in the initial consultation may have been overtaken by events.

4. The existence of exigent or urgent circumstances that militate against any delay in the interrogation.

5. Whether an issue of a legal nature has arisen in the course of the interrogation, *e.g.* if the police bring forward "similar fact" occurrences allegedly involving the detainee, he or she might legitimately want to understand how a response to questions on those collateral events might impact potential liability on the crime charged.

6. The mental and physical condition of the detainee, including signs of fatigue or confusion, to the extent that this is or ought to be apparent to the interrogator.

[107] The Chief Justice and Charron J. argue that their truncated interpretation of s. 10(*b*) would be easier for the police to administer. No doubt this is true. Rights during an interrogation will be harder to administer than no rights. My colleagues state:

> Finally, the proposed test is so vague that it is impractical. No doubt, courts over the years would sort out these problems as best they can. But these efforts will leave a trail of *Charter* motions, appeals and second trials in their wake. [para. 59]

This "floodgates" argument, also advocated by the Crown, has been rejected in numerous *Charter* contexts notwithstanding that the elaboration of *Charter* rights have generally left in their wake "a trail of *Charter* motions, appeals and second trials". The *Charter* is framed in general language. Litigation is inevitable. The criminal justice system might well work more smoothly and efficiently from the crime-stopper's perspective if we had no *Charter*,

but so long as we do have a *Charter* s. 10(b) like other *Charter* rights should be given a broad interpretation consistent with its purpose. If it takes time to work out its proper amplitude so be it.

[108] Is the test suggested above vague and impractical? "Reasonableness" is a constitutional standard that is widely employed and is familiar to the police. Officers regularly consult with Crown counsel and have experience in when taking counsel is reasonably necessary. The police are regularly involved in search and seizure activity; yet s. 8 of the *Charter*, they know, protects only against "unreasonable search and seizure". In the case of a warrantless search, the Crown must establish that the manner in which the police carried out the search was reasonable: *R. v. Collins*, [1987] 1 S.C.R. 265, at p. 278. The police must, therefore, determine in the first instance the extent of the rights of the individuals they wish to search. Even within s. 10(*b*) the police will often be required to decide whether a detainee has exercised "reasonable" diligence in the initial exercise of his s. 10(*b*) rights. The police must wait a "reasonable" time for the detainee to get in touch with counsel before proceeding with questioning. The police deal routinely with these and other aspects of "reasonableness" and I see no reason why they should not be capable of treating s. 10(*b*) reasonableness in relation to a demand for further consultation with counsel with the same level of professionalism.

[109] The existence of a s. 10(*b*) right creates a correlative duty (or responsibility) on the part of the police to respect and implement that right. However, as mentioned at the

outset, there seems to be a certain dissonance emerging in the court's view of the police capacity for judgment when it comes to the determination (in the first instance) of their own previously unrecognized *powers* at common law (see *e.g. R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725), and police capacity in making determinations (in the first instance) about their *duties* and *responsibilities*.

[110] In the recent case of *R. v. Waugh*, 2010 ONCA 10, a police officer decided that he had the power to impound a motor vehicle he believed to be uninsured. He had no statutory authority to do so. The correctness of the police decision to seize the car, accordingly, fell to be decided under the *Dedman/Waterfield* test (*R. v. Waterfield*, [1963] 3 All E.R. 659 (C.C.A.)), which incorporates two rather vague criteria, namely (1) did the police conduct in question fall with the "general scope of any duty imposed by statute or recognized by common law", and (2) did such conduct "albeit within the general scope of such a duty, involve an unjustifiable use of power associated with the duty" (para. 26). R. A. Blair J.A., for the Ontario Court of Appeal conceded that

> the common law has never explicitly recognized the authority of the police to tow a vehicle as deriving from their general police duties. However, I see no reason why that should not be the case provided the *Dedman/Waterfield* test is met in the circumstances and provided the police act reasonably and prudently. Here, in my view, the test is met and the police acted reasonably and prudently. [para. 27]

(There's that "reasonably" word linked to police judgment again!) The *Dedman/Waterfield*

test poses quite an abstract assessment for the police to make when deciding if they can seize a motor vehicle (*Waugh*), or blockade the parking lot of a strip club based on a 911 gun call (*Clayton*), or initiate a random road stop without statutory authority (*Dedman*), or detain someone on the street for questioning even if the police possess no reasonable and probable grounds to believe that the person was involved in criminal activity (*R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59). In all these cases, the police made the initial determination of their previously unrecognized powers and the courts held that the police got it right.

[111] My colleagues LeBel and Fish JJ. object to this "intermediate position" on s. 10(*b*) with the argument that the exercise of the right to counsel "cannot be made to depend on an interrogator's opinion" (para. 172), and "we do not accept that fresh access to counsel is limited to situations where the police interrogator is satisfied either that there has been a material change in circumstances, or that the request is not made in an effort to delay or distract" (para. 179 (emphasis in original)). This is a curious argument. In every interaction between the police and the citizen, the police have to assess, in the first instance, the limits of their authority and the extent of the rights and liberties sought to be exercised by the person they are dealing with. This is true of the individual's right to drive out of a parking lot (*Clayton*), resist a body search (*Mann*), or walk away from a police officer despite the command: "Wait a minute. I need to talk to you before you go anywhere" (*R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460). Equally, short of inserting a judge (as well as defence counsel) into the police interrogation room, it will always be for the interrogator to determine *in the first instance* whether the s. 10(*b*) right is invoked reasonably. The alternative is to

allow the detainee to shut down the interrogation simply by uttering the magic words, "I want to speak to my lawyer NOW", a form of unilateral control by the detainee seemingly embraced by my colleagues LeBel and Fish JJ., at para. 177.

[112] While I agreed with the dissent of Fish J. in *Singh*, I do not see the proper role of s. 10(*b*) as a trump card to be played against the majority judgment in *Singh* by giving the detainee the power under s. 10(*b*) to unilaterally bring a halt to the custodial interrogation in a way that *Singh*'s repeated assertion of a desire to return to his cell failed to accomplish. Section 10(*b*) should be understood and construed in its own terms and for its own purposes. The result of my colleagues' interpretation is to make the detainee the sole judge of further consultations with counsel even if, viewed objectively, such demands are made whimsically or capriciously.

[113] In my view, the police are entitled in the first instance to assess the objective circumstances surrounding the s. 10(*b*) request. Their assessment is always reviewable by a judge, in the fullness of time, and with the luxury of hindsight. If the police have got it wrong, the prosecution will pay the price.

[114] I cannot think that the police assessment of whether a detainee's request to consult counsel falls within the purpose of s. 10(*b*) — access to proper legal assistance — is any more difficult than whether setting up a random road stop falls within the general concept of police "duty". Nor is determining whether access to counsel is justified by the

objective circumstances of the interrogation any more difficult to assess than whether the existence of the police power to blockade the parking lot of a strip club is "unjustifiable". In *Clayton*, moreover, a majority of the Court held that police powers thus defined will necessarily be "consistent with *Charter* values" because justification for the police conduct under the *Waterfield/Dedman* test focusses on "whether the interference with liberty is necessary given the extent of the risk and the liberty at stake, and no more intrusive to liberty than reasonably necessary to address the risk" (para. 21 (emphasis added)). If the police are handed the task of making such on-the-spot judgment calls "reasonably necessary" in relation to previously unrecognized police powers, why is it beyond police capacity to assess their responsibilities in the course of a custodial interrogation? Why are general criteria satisfactory for police to assess their powers but "so vague" as to be "impractical" in relation to their duty to respect a detainee's right to counsel? The answer is that police are quite capable of making both types of judgment calls *in the first instance*.

[115] I agree with my colleagues the Chief Justice and Charron J. that "[n]o doubt, courts over the years would sort out these problems as best they can" (para. 59). This is so — just as the courts (and police) have sorted out (and continue to sort out) every other *Charter* problem "as best they can". The essential fairness of our system of justice is at stake in police interrogations. We should not be dissuaded from giving the s. 10(*b*) right its full expression by the Crown's invocation of a *bright line* for ease of administration.

Application to the Facts of this Case

[116] The relevant facts are set out in the majority opinion. For my purposes, it is important to note that about half way through the interrogation (*i.e.* after about two and a half hours of questioning), Sgt. Skrine gave an account of how he thought the appellant, while intoxicated, had killed the victim in a blind rage. He said "the evidence is overwhelming" but he didn't say what it was. He claimed (falsely) the existence of incriminating DNA at the crime scene. The appellant's responses were non-committal. When Sgt. Skrine told the appellant that he shouldn't take the interview lightly, the appellant said:

> Sinclair: I don't take any of this lightly. That's at least I'm not sure, I'm not talkin right now and I wanna see my lawyer and stuff but like I don't take anything you're sayin lightly. [Emphasis added; Supp. A.R., at p. 58.]

[117] A few minutes later the police officer again hammered home the message that further resistance would be futile:

> Skrine: . . . Maybe you're sittin there with some glimmer of hope. Some glimmer of hope that this is all gonna go away. But it's not. It is not gonna go away. You are done. The evidence here is absolutely overwhelming. Absolutely overwhelming. And you can't change that.
> The only questions left are why.
>
> Sinclair: I want my lawyer to look through all that.
>
> Skrine: Your lawyer's gonna get all that. [Emphasis added; Supp. A.R., p. 59]

But of course Sgt. Skrine did not intend the lawyer to "get all that" until after the appellant's confession was in the bag. Then again, a little further on:

> Skrine: There had to be something that cause the snap. Hey? You didn't do this without reason, right? Hmm? Trent? You killed Gary because you enjoy it right? Hmm? Gary? Er Trent?
>
> Sinclair: I wanna talk to my lawyer.
>
> Skrine: Trent you talked to your lawyer, okay?
>
> Sinclair: For a minute on the phone, that's no, I wanna talk to him when he's ... when I see him on Monday.
>
> Skrine: Well you'll have an opportunity to talk to him again, but you already talked to him twice, okay Trent. And you know what? And nobody can come in and make this decision for you but you.
>
> Sinclair: When my lawyer comes. . . . [Supp. A.R., p. 67]

[118] The initial refusal to allow the appellant to consult further with his counsel did not constitute a breach. The breach occurred when after several hours or so of suggestions (subtle and not so subtle) and argument, Sgt. Skrine confronted the appellant with what he said was "absolutely overwhelming" evidence linking the appellant to the crime and the appellant repeated his desire to consult with his counsel before going further. At least in part the appellant must have wondered if the initial 360 seconds of legal advice was still valid. Given the unfolding of new information up to that point in the interview, his request to speak again to counsel was reasonable, and the police refusal of that further consultation was, in my view, a breach of s. 10(*b*).

[119] The appellant's subsequent admissions to the undercover officer in the jail cell were "part of the same transaction or course of conduct" as the statement to Sgt. Skrine (*R. v. Wittwer*, 2008 SCC 33, [2008] 2 S.C.R. 235, at para. 31) and were thus tainted, because the appellant's reason for confessing to the undercover officer was explicitly linked to the fact that he had just given himself up in the interrogation room: "They've got me, the body, the sheets, the blood, the fibres on the carpet, witnesses. I'm going away for a long time but I feel relieved." The same is true of the re-enactment. Without the initial statement to Sgt. Skrine, it would not have taken place. This causal connection is sufficient to establish the requisite link.

[120] In sum, the statement to the undercover officer and the evidence produced by the re-enactment cannot be separated from the earlier breach of s. 10(*b*) and were therefore obtained in breach of the *Charter*.

[121] I would have excluded the evidence under s. 24(2) in light of the general presumption of exclusion of unconstitutionally obtained statements: *R. v. Grant*, [2009] 2 S.C.R. 353.

[122] In my view, the appeal should be allowed and a new trial ordered.

The reasons of LeBel, Fish and Abella JJ. were delivered by

LEBEL AND FISH JJ. —

I. Overview

[123] This case concerns the reasonable limits that can be placed on the effective exercise by detainees of their constitutionally entrenched right to counsel, in the face of relentless custodial interrogation. At its core, it again raises the question "whether 'no' means 'yes', where a police interrogator refuses to take 'no' for an answer from a detainee under his total control" (*R. v. Singh*, 2007 SCC 48, [2007] 3 S.C.R. 405, at para. 55).

[124] As we shall later explain, the right to counsel is inextricably bound up with, although not subsumed by, the right to silence. One supports the other, particularly in the context of custodial interrogation and, more particularly still, where a detainee who has repeatedly invoked his right to silence is systematically denied access to counsel by a determined police officer who relentlessly pursues the interrogation of the detainee under his total control "in an effort to get [the detainee] to confess, no matter what" (*Singh*, at para. 59 (emphasis in original)). At its core, that is what this appeal is about: The focus in *Singh* was on the right to silence; our concern in this case is with the right to counsel. Both rights are constitutionally guaranteed. We know from experience that, in the context of custodial interrogations, *you can't have one without the other*.

[125] We disagree with the disposition proposed by the Chief Justice and Charron J. Moreover, we do not agree with their analysis of the scope and purpose of the s. 10(*b*) right to counsel in the *Canadian Charter of Rights and Freedoms*. A proper understanding of this right should acknowledge that it is far broader than their reasons indicate, and reflects the role that counsel plays in the life of the law, the protection of the rule of law and, particularly, in the administration of criminal justice. In essence, our colleagues' approach also subjects the exercise of the right to consult counsel to a detainee's successful demonstration, to the satisfaction of the police, that there have been fresh developments amounting to a material or substantial change in jeopardy. We are concerned, too, that their conclusion tends to erode the very basic principles of Canadian criminal law, particularly the protection against self-incrimination and the presumption of innocence.

[126] We therefore hold that Mr. Sinclair's constitutionally protected right to counsel was infringed in this case, because his police interrogators prevented him from obtaining the legal advice to which he was entitled. In our view, the detainee's access to legal advice would have mitigated the impact of the interrogating officer's relentless and skilful efforts to obtain a confession.

[127] Furthermore, we find that this breach of the appellant's right to counsel was particularly serious. It cannot be characterized as minor or technical. On the contrary, it went to the core of the self-incrimination interest, which s. 10(*b*) is meant to protect. The

breach also impacted on other interests that s. 10(*b*) is likewise meant to reflect and safeguard, notably the vital role of counsel under our legal system, particularly in the criminal law context.

[128] These conclusions are entirely consistent with the fundamental principles governing the administration of justice in Canada. Under our system of criminal justice, the state bears the sole burden of proving the guilt of the accused. This basic precept finds expression in the presumption of innocence and the right to silence. Both rights are constitutionally protected. It follows inexorably that a detainee under police control (or any accused person, for that matter) is under no obligation to cooperate with a police investigation or to participate in an interrogation. To suggest that detainees must in any such way assist the state in securing their conviction and punishment, or otherwise expose themselves to an enhanced risk of self-incrimination, is to turn our system of criminal justice on its head. It effectively recognizes a new police power of virtually unfettered access, for the purposes of endless interrogation, to custodial detainees who have *chosen* to remain silent.

[129] We do not take issue with the right of the police to continue their investigation where an accused wishes to consult with counsel, before submitting to further custodial interrogation. But that is not the question that concerns us here. The police can continue their investigation as they see fit, but not in violation of, or with disregard for, the constitutional rights of detainees.

[130] Clearly, everyone who is *not* detained is entitled to consult with counsel before responding to police questioning. On what principle should detainees, whose right to counsel is constitutionally guaranteed because they are under total police control and therefore more vulnerable to pressure and manipulation, be deprived of that very same protection? Surely, the detainee cannot be said to subvert the investigative process by exercising either their right to consult with counsel, their right to silence, or both.

II. The Facts, Briefly

[131] We largely agree with the summary of the facts in this appeal provided by the Chief Justice and Charron J. We think it helpful, however, to examine more closely the chronology of the detainee's repeated requests for counsel and invocations of his right to silence. A close reading of the interaction between detainee and police interrogator demonstrates the need for ongoing assistance of counsel, in the context of the relentless custodial interrogation that occurred in this case.

[132] Mr. Sinclair was arrested in the early morning of December 14, 2002. Immediately upon arrest, he was informed of his right to consult counsel. When asked if he wished to call a lawyer, Mr. Sinclair responded: "Not right this second" (A.R., at p. 524). He was then taken by the police to the local RCMP detachment.

[133] When he arrived, he was given an opportunity to call counsel. At 6:53 a.m., he contacted Mr. Janicki, a lawyer who had represented him previously. Mr. Sinclair spoke to his lawyer for three minutes. He told the police that his lawyer was going to call him back.

[134] Mr. Sinclair was placed in a cell until 9:40 a.m., when Mr. Janicki asked to speak with him. They spoke for another three minutes.

[135] At 4:38 p.m., Mr. Sinclair was taken from his cell to the interrogation room. He was met by Sgt. Kerry Skrine, an RCMP detective with the Major Crimes Unit, who described himself as an experienced interrogator and a member of the "designated interview team" (A.R., at p. 247).

[136] After being informed of his right to silence, Mr. Sinclair said: "I don't have anything to say right now" (Supp. A.R., at p. 3). He told Sgt Skrine that he was "not saying anything or talking about anything that's until my lawyer's around and he tells me what's going on and stuff" (A.R., at p. 542). With regard to Mr. Sinclair's request to have his lawyer present during the interrogation, Sgt. Skrine stated that "the law in this country anyway is that ... you do not have a right to have a lawyer present with you, okay, while you're being interviewed by the police" (A.R., at p. 542).

[137] Despite Mr. Sinclair's categorically expressed and reiterated decision not to speak to the police interrogator, Sgt. Skrine continued to interrogate him.

[138] Mr. Sinclair objected to the continued questioning:

> What are these questions, like, I'm just not feeling comfortable not having a lawyer around. Like you say I don't have a right to have a lawyer in the room while I'm bein' questioned and I don't think that make doesn't even make sense in my head.
>
> ...
>
> I feel I should have my lawyer present while any type of questioning goes on like ...
>
> ...
>
> Like if you were reverse the scenario, and it was you in this chair ...
>
> ...
>
> I think you'd wanna have a lawyer present. You guys are looking at putting me away for the rest of my life. [A.R., at p. 546]

[139] Sgt. Skrine persisted with the interview, slowly moving from uncontroversial topics, such as Mr. Sinclair's relationship with his siblings and tobacco preferences, to his complicity in the killing of Mr. Grice.

[140] During the course of his five-hour interrogation, each accusatory statement or claim that the evidence against him was overwhelming was met with a consistent response from Mr. Sinclair: a request to speak to his lawyer or to have his lawyer present during questioning. These requests were firmly and systematically rebuffed.

[141] Sgt. Skrine stated that the police had spoken with witnesses who had directly implicated Mr. Sinclair in the murder, and then pressed Mr. Sinclair to confess. Mr. Sinclair responded as follows:

> Skrine: You didn't do this without reason, right? Hmm? Trent? You killed Gary because you enjoy it right? Hmm? ... Trent?
>
> Sinclair: I wanna talk to my lawyer.
>
> Skrine: Trent you talked to your lawyer already, okay?
>
> Sinclair: For a minute on the phone, that's no, I wanna talk to him when he's when I see him on Monday.
>
> Skrine: Well you'll have an opportunity to talk to him again, but you already talked to him twice, okay, Trent. And you know what? And nobody can come in and make this decision for you but you.
>
> Sinclair: When my lawyer comes ... [A.R., at p. 607]

[142] Shortly afterwards, Sgt. Skrine left the interview room. When he returned, he continued to press Mr. Sinclair to confess to the killing. Sgt. Skrine told Mr. Sinclair that the police had found bedding from the hotel (they had) and had identified Mr. Sinclair's DNA on the bedding (they had not) (Supp. A.R., at p. 85).

[143] Immediately after Sgt. Skrine revealed these two pieces of evidence, Mr. Sinclair declared, "You got me I know it ..." (Supp. A.R., at p. 85). He proceeded to confess in detail

to the murder of Gary Grice.

[144] When Mr. Sinclair returned to his cell, five hours after his first request to again consult with counsel, he spoke to his cellmate about the interrogation. Unbeknownst to Mr. Sinclair, he was speaking to an undercover officer, Cst. Sergio L. B. Dasilva. Mr. Sinclair told him, "They've got me, the body, the sheets, the blood, the fibres on the carpet, witnesses. I'm going away for a long time but I feel relieved" (Frankel J.A., 2008 BCCA 127, 252 B.C.A.C. 288, at para. 23).

III. Analysis

A. *The Text of Section 10(b)*

[145] Relying on *R. v. Logan* (1988), 46 C.C.C. (3d) 354 (Ont. C.A.), the Chief Justice and Charron J. maintain that the phrase "on arrest or detention" indicates a single point in time, not a continuum (para. 44). This interpretation also formed the basis of the judgment below (Frankel J.A., at para. 48). With respect, we disagree with this narrow reading of s. 10(*b*).

[146] We will first examine the English provision and then turn to its French counterpart. Section 10(*b*) of the *Charter* provides: "Everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right." The

French version reads: "*Chacun a le droit, en cas d'arrestation ou de détention ... d'avoir recours sans délai à l'assistance d'un avocat et d'être informé de ce droit*."

[147] In our view, the plain meaning of s. 10(*b*) favours an ongoing right to the assistance of counsel. The words "retain" and "instruct" signify a continuing relationship between client and counsel. On this basis alone, it is difficult to see how the s. 10(*b*) right could be "spent" upon its initial exercise.

[148] Nor does the phrase "on arrest or detention" limit s. 10(*b*) to a one-time consultation. Section 10(*b*) is of course triggered "on arrest or detention", which ensures that the detainee is afforded an opportunity to consult counsel as soon as possible, and certainly before any interrogation. Indeed, as Lamer J. (later C.J.) put it in *R. v. Manninen*, [1987] 1 S.C.R. 1233, at p. 1243: "For the right to counsel to be effective, the detainee must have access to this advice before he is questioned or otherwise required to provide evidence."

[149] However, it hardly follows that the s. 10(*b*) right, though triggered by a detention, is spent upon this initial consultation. If it were, defence counsel across the country would soon find themselves without a thing to do. In this sense, the Chief Justice and Charron J.'s view that s. 10(*b*) is spent upon the initial exercise of course conflicts with the right to counsel at trial (see e.g. R. v. Rowbotham (1988), 41 C.C.C. (3d) 1 (Ont. C.A.)) and, in some circumstances, on appeal (*Criminal Code*, R.S.C. 1985, c. C-46, s. 684(1)).

Section 10(*b*) does not create for the detainee a black hole between the time of arrest or detention, and the detainee's first appearance before a judge.

[150] This interpretation is bolstered by a reading of the French text. As Lamer C.J. explained in *R. v. Collins*, [1987] 1 S.C.R. 265, at p. 287, when faced with diverging French and English versions of a *Charter* provision, the Court should employ a purposive approach and adopt the interpretation "which better protects that right".

[151] The French version of s. 10(*b*) bolsters our interpretation, despite differing from the English version in two minor, yet significant ways. First, instead of the right to "retain and instruct counsel", the French provision guarantees detainees the right to "*l'assistance d'un avocat*". Second, the French version states that the right is triggered "en cas *d'arrestation*", and not "*on* arrest".

[152] As Mr. Sinclair submits, the term "*l'assistance*" connotes a broader role for legal counsel than simply providing the advice to *keep quiet*. Accordingly, the "*assistance*" of counsel cannot be confined to a single consultation followed by a lengthy interrogation during which the detainee is held virtually incommunicado. If this were the case, then we also agree with the Ontario Criminal Lawyer's Association that this could be accomplished by a recorded message on an answering service. And if the Chief Justice and Charron J. agree that the right to counsel cannot be reduced to a simple phone message, then it is difficult to understand how they can endorse an interpretation of the right to "retain and

instruct counsel" that would simply replace the recorded message with a one minute telephone call to the same effect.

[153] "[*E*]*n cas de*" can be translated into English as "in the event of" (*Collins-Robert French-English, English-French Dictionary* (2nd ed. 1987), at p. 102, "*cas*"). Therefore, unlike with "on arrest", there is no possible connotation of a singular occurrence or a "point in time". Instead "*en cas d'arrestation ou de détention*" implies a triggering event — arrest or detention — which then results in a constitutionally entrenched and prospective right to the assistance of counsel.

[154] Accordingly, the plain meaning of s. 10(*b*), in both French and English, supports a broad application of the right to counsel, which includes an ongoing right to consult with counsel.

B. *The Purpose and Scope of the Section 10(b) Right to Counsel*

[155] Our textual interpretation of the s. 10(*b*) right is supported by both the purpose and the scope of s. 10(*b*). Canadian criminal law is premised on several animating, normative principles, including the presumption of innocence, the protection against self-incrimination, and the right to silence. These principles have all attained constitutional status, reflected in ss. 11(*c*), 11(*d*) and 13 of the *Charter*, as well as in the residual protection found in s. 7.

[156] The presumption of innocence, described as the "one golden thread" that runs "throughout the web of the English Criminal Law" (*Woolmington v. Director of Public Prosecutions*, [1935] A.C. 462, at p. 481 (H.L.), *per* Lord Sankey), was recognized by this Court as the "single most important organizing principle in criminal law" (*R. v. P.(M.B.)*, [1994] 1 S.C.R. 555, at p. 577). Now constitutionally entrenched in s. 11(*d*) of the *Charter*, the presumption of innocence ensures that the state must meet its heavy burden before an accused person will be subjected to the consequences of a criminal conviction:

> In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.
>
> (*R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 120, *per* Dickson C.J.)

[157] The presumption of innocence is closely related to the protection against self-incrimination. If the presumption of innocence places a burden on the state alone to prove the accused's guilt beyond a reasonable doubt, then it follows that the accused cannot be made to offer evidence or information that would assist the state in that endeavour. Thus, the right against self-incrimination simply confirms that there is no obligation on the part of a suspect to assist, in any way whatsoever, in the investigation against them:

> The core idea of the principle is that when the state uses its power to prosecute an individual for a criminal offence, the individual ought not to be required to assist the state in the investigation or trial of the offence.
>
> (Hamish Stewart, "The Confessions Rule and the *Charter*" (2009), 54 *McGill L.J.* 517, at pp. 520-21).

[158] The right to silence is the last piece in this system of pre-trial procedural protections. In *Rothman v. The Queen*, [1981] 1 S.C.R. 640, Lamer J. provided this quintessential articulation:

> In Canada the right of a suspect not to say anything to the police ... is merely the exercise by him of the general right enjoyed in this country by anyone to do whatever one pleases, saying what one pleases or choosing not to say certain things, unless obliged to do otherwise by law. It is because no law says that suspect, save in certain circumstances, must say anything to the police that we say that he has the right to remain silent, which is a positive way of explaining that there is on his part no legal obligation to do otherwise. [p. 683)

See also *R. v. Turcotte*, 2005 SCC 50, [2005] 2 S.C.R. 519, at para. 41, *per* Abella J.

[159] The right to silence, the right against self-incrimination, and the presumption of innocence are interrelated principles and the core values that animate the administration of criminal justice in Canada. They work together to ensure that suspects are never obligated to participate in building the case against them. As this Court has noted time and again, the ability of an accused to exercise these fundamental rights is dependent upon the assistance of counsel.

[160] The Chief Justice and Charron J. assert that the s. 10(*b*) right has the narrow

purpose of ensuring that detainees are able to effectively assert their right to silence and, by extension, secure their right against self-incrimination. We agree that the overarching purpose of the right to counsel lies in the protection against compelled self-incrimination, and extends to the custodial context in order to make the detainee's choice whether to speak to the police a meaningful one. This, in turn, preserves "fairness" in the investigative process, or at least fosters that objective: *R. v. Bartle*, [1994] 3 S.C.R. 173.

[161] However, in our view, the role of counsel in the administration of criminal justice, and under 10(*b*), is much broader. Our view is shaped by what we see as a proper appreciation of the role of counsel within the justice system generally. Lawyers are bound by their oath of office, by the rules that govern their profession and by their status as officers of the court. They must ensure that the interests of their clients, however zealously advocated, remain subject to society's interest in ensuring the orderly and ethical resolution of legal disputes: see *Fortin v. Chretien*, 2001 SCC 45, [2001] 2 S.C.R. 500.

[162] This Court has long emphasized the essential role that lawyers "are expected to play in the administration of justice and the upholding of the rule of law in Canadian society" (*Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, [2002] 3 S.C.R. 2009, at para. 64, *per* LeBel J., dissenting, but not on this point. See also *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 187; *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873, at para. 22.

[163] This role is no different in the criminal context, and applies to the defence of the criminal accused no less than to landlords, tenants, separating or divorcing partners, employers and employees and all others whose opposing rights or interests are subjected to litigation or legal scrutiny. However, the obligations of the lawyer extend beyond his or her client, and mandate a role that is "vital to the maintenance of order in our society and the due administration of the law in the interest of the whole community" (*Andrews*, at p. 188). Rather than having a detrimental effect on the administration of criminal justice, the role played by lawyers actually furthers and ensures the proper administration of justice.

[164] As Gonthier J. affirmed in *Fortin*, the lawyer's role as officer of the court extends to the pre-litigation stage: "As an officer of the court, the advocate plays an essential role in our justice system, in representing the rights of litigants before the courts, but also at the preceding stage of settling disputes" (para. 54). In the criminal context, the advice of counsel is even more important at the pre-charge stage.

[165] When a person is detained but not yet charged, the events that follow will determine whether that person can properly be charged and prosecuted. If that person is in fact charged, what occurred at the pre-charge stage will likely influence the nature of the proceedings that follow. The detainee, under total police control and isolated from family and friends, is particularly vulnerable.

[166] Upon arrest, the suspect will be subject to skilled and persistent interrogation,

as occurred in this case. Confronted by bits and pieces of incriminating "evidence", conjectural or real, the detainee may be wrongly persuaded that maintaining his or her right of silence is a futile endeavour: that the advice to remain silent originally provided by counsel is now unsound. Through ignorance of the consequences, the detainee may feel bound to make an incriminatory statement to which the police are not by law entitled. In what may seem counterintuitive to the detainee without legal training, it is often better to remain silent in the face of the "evidence" proffered, leaving it to the court to determine its cogency and admissibility, and forego the inevitable temptation to end the interrogation by providing the inculpatory statement sought by the interrogators.

[167] Access to counsel is therefore of critical importance at this stage to ensure, insofar as possible, that the detainee's constitutional rights are respected and provide the sense of security that legal representation is intended to afford. However, it is also in society's interest that constitutional rights be respected at the pre-trial stage, as doing so ensures the integrity of the criminal process from start to finish. In these circumstances, counsel's advice is not simply a matter of reiterating the detainee's right to silence, but also to explain *why* and *how* that right should be, and can be, effectively exercised. In other words, the lawyer not only tells the detainee not to speak but, perhaps more importantly, *why* he ought not to.

[168] The assistance of counsel is a right granted not only to detainees under s. 10(*b*) of the *Charter*, but a right granted to every accused by the common law, the *Criminal Code*

and ss. 7 and 11(*d*) of the *Charter*. It is not just a right to the assistance of counsel, but to the *effective* assistance of counsel, and one that this Court has characterized "as a principle of fundamental justice" (*R. v. G.D.B.*, 2000 SCC 22, [2000] 1 S.C.R. 520, at para. 24, *per* Major J.).

[169] Like the right to silence, this right has not been granted to suspects and to persons accused of crime *on the condition that it not be exercised when they are most in need of its protection* — notably at the stage of custodial interrogation, when they are particularly vulnerable and in an acute state of jeopardy.

[170] As mentioned above, the Chief Justice and Charron J. would subject a detainee's request to consult with counsel, made during the course of an interrogation, to a requirement, in essence, that there have been, in some form, a material or substantial change of jeopardy in the eyes of police interrogators. The limitations they propose are inconsistent with the text and purpose of s. 10(*b*). They are also inconsistent with the broader and indispensable role of counsel in the administration of criminal justice. Giving s. 10(*b*) the requisite large and liberal interpretation leads us to a principled disagreement with our colleagues that the effective exercise of the s. 10(*b*) right does not require greater access to counsel, on the part of detainees, in the custodial setting.

C. *The "Intermediate Position" of Binnie J.*

[171] We recognize that the reasons of our colleague Binnie J. are meant to expand the protections afforded by s. 10(*b*). Building on precedent that has recognized the right of detainees to consult counsel whenever they face a material change in jeopardy, our colleague would permit detainees to do so, upon request, but only where there is a genuine need for consultation and not where the request is made for the purpose of delay or distraction (para. 80). Our colleague then sets out a detailed list of factors to guide police interrogators in determining whether there is "objective support" for the detainee's request (para. 106).

[172] In our view, the right to counsel, and by extension its meaningful exercise, cannot be made to depend on an interrogator's opinion in this way. Detainees are constitutionally entitled to consult counsel without having to persuade their interrogators that their wish to do so is *valid* or *reasonable*. And no detainee is bound, simply because an interrogator sees no valid need for further consultation, to submit to the unrelenting questioning of an interrogator, bent on extracting a confession to be relied on in prosecuting the detainee.

[173] In support of his contention that it would be inappropriate to allow counsel to be present during a custodial interrogation, Binnie J. notes that, in civil examinations for discovery, the presence of counsel can be a "disruptive force" (para. 101). While we are sure that our colleague does not wish to draw procedural parallels between the civil and criminal justice systems, we must reiterate that unlike in the civil process where all parties, including the defendant, are compellable witnesses and have reciprocal disclosure obligations, the

accused in a criminal investigation enjoys a constitutionally protected right to silence and has absolutely no obligation to assist the state with its prosecution. This bedrock principle forms the basis of our common law and is enshrined in the Constitution. The assistance of lawyers might be disruptive during interrogations. But so are the presence of lawyers at trial, the right to silence, the presumption of innocence, and the *Canadian Charter of Rights and Freedoms*.

[174] Finally, we wish to address the application of Lamer J.'s comment in *R v. Smith*, [1989] 2 S.C.R. 368, at p. 385 (cited at para. 101 of Binnie J.'s reasons and at para. 58 of the Chief Justice and Charron J.'s reasons):

> This limit on the rights of an arrested or detained person is essential because without it, it would be possible to delay needlessly and with impunity an investigation and even, in certain cases, to allow for an essential piece of evidence to be lost, destroyed or rendered impossible to obtain. The rights set out in the *Charter*, and in particular the right to retain and instruct counsel, are not absolute and unlimited rights. They must be exercised in a way that is reconcilable with the needs of society. An arrested or detained person cannot be permitted to hinder the work of the police by acting in a manner such that the police cannot adequately carry out their tasks.

[175] We note that in *Smith*, the detainee had unequivocally waived his right to counsel. The language used by Lamer J. should not be extended to the present appeal, where the detainee not only exercised his right to counsel once, but consistently maintained that he wished to re-consult his lawyer.

[176] The close connection between the right to counsel and the right to silence is manifest in the context of custodial interrogations, where the police, as we have seen time and time again, systematically deny detainees access to counsel in order to prevent them from effectively exercising their right to silence. This case and *Singh* are but two recent examples. In both instances, a detainee under the total control of the police unequivocally and repeatedly asserted his decision to remain silent. In both instances, their interrogators ignored the detainees' assertions of that constitutional right and, in order to prevent or circumvent its effective exercise, denied the detainees' repeated request to consult their lawyers. To "break" or wear down the detainees, the police officers continued to interrogate them relentlessly for hours.

[177] In our view, detainees who demand access to counsel before being further subjected to relentless interrogation against their will can hardly be said to exercise their right to counsel "whimsically or capriciously" (Binnie J., at para. 112). They are constitutionally entitled "to speak to [their] lawyer NOW" (para. 111) — not TOMORROW, after the police, who hold all the cards, have won what Binnie J. aptly describes as a prolonged "endurance contest" (para. 89). In Binnie J.'s words, at para. 89:

> The Crown seems to conceive of the police interrogation as an endurance contest between the detainee, who starts off with the benefit of the standard police warning and generic advice from his or her lawyer (presumably to refuse to cooperate — what else can the lawyer advise at that outset?) and, on the other hand, an experienced police interrogator who wants to cajole and manoeuvre and wear down the detainee into making incriminating statements and, if possible, a full confession.

Under our Constitution the right to counsel enshrined in s. 10(*b*) is not "spent" upon its initial exercise following arrest or detention. Nor is its further exercise subject to the permission of the police officers who deliberately ignore the detainee's repeated requests to consult counsel. By persisting instead with their relentless custodial interrogation, despite the detainee's clearly expressed choice not to speak with them, the police flout another constitutional right — the detainee's right to silence. Often if not invariably, they thereby succeed in persuading the detainee that further attempts to exercise either constitutional right will merely postpone the inevitable and prove to be in vain.

[178] Finally, at least in the context of custodial interrogations, nothing in s. 10(*b*) renders the effective exercise by detainees of their right to counsel subject to an "objective" determination by their interrogators regarding the presence or absence of the factors enumerated by Binnie J. (para. 106). None of these proposed limits on the right to counsel were the subject of constitutional justification under s. 1 of the *Charter*. The grounds proposed by our colleague may well provide helpful guidance in determining whether evidence obtained in violation of s. 10(*b*) should be excluded under s. 24(2) of the *Charter*. In our respectful view, however, they do not bear on the contours or content of the right to counsel itself.

[179] In short, we do not accept that fresh access to counsel is limited to situations where *the police interrogator* is satisfied either that there has been a material change in circumstances, or that the request is not made in an effort to delay or distract. As we have

shown, this approach is consistent neither with the text of s. 10(*b*) itself, nor with its broader purpose. We also reject this approach on the basis that it focusses on the objective observations and conclusions of the police, who have the detainee in their total control, and not on the subjective needs of the accused.

D. *Oickle and the Singh-Sinclair Squeeze*

[180] In our view, the approach of the Chief Justice and Charron J., when coupled with the majority decision in *Singh*, carries significant and unacceptable consequences for the administration of criminal justice and the constitutional rights of detainees in this country.

[181] The Chief Justice and Charron J. suggest that any residual concerns regarding the detainee's inability to consult counsel during a custodial interrogation can be addressed by an assessment of the voluntariness of the statement. More specifically, with respect to the detainee's right to remain silent, they suggest at para. 60 that the "answer" lies with *Singh*:

> The better approach is to continue to deal with claims of subjective incapacity or intimidation under the confessions rule. For example, in *R. v. Oickle*, 2000 SCC 38, [2000] 2 S.C.R. 3, at para. 61, the Court recognized that using non-existent evidence to elicit a confession runs the risk of creating an oppressive environment and rendering any statement involuntary. In *Singh*, the Court stressed that persistence in continuing the interview, particularly in the face of repeated assertions by the detainee that he wishes to remain silent, may raise "a strong argument that any subsequently obtained statement was not the product of a free will to speak to the authorities" (para. 47). [Emphasis added.]

[182] We question our colleagues' assertion that *Singh*, and the confessions rule more

generally, are capable of dealing with these residual concerns in any meaningful manner. The reasons of the Chief Justice and Charron J., we believe, place an over-reliance on the ability of the confessions rule to provide this residual but essential protection.

[183] The common law requirement of voluntariness set out in *R. v. Oickle*, 2000 SCC 38, [2000] 2 S.C.R. 3, was never intended to serve as a substitute for the constitutional guarantees that concern us here. As Binnie J. amply demonstrates, it has hardly offered the residual protection it is said by the Chief Justice and Charron J. to afford. We need only go back to the particular facts of both *Singh* and the within appeal to demonstrate why this is so. Mr. Singh asserted his right to silence 18 times during the course of his custodial interview. Yet, a majority of the Court concluded that his inculpatory statement was nevertheless voluntary. Similarly, Mr. Sinclair's statement was deemed voluntary by the trial judge, and an appeal against that finding was abandoned in the Court of Appeal (see reasons of Frankel J.A., at para. 4) and not further challenged in this Court. Mr. McCrimmon, the appellant in the companion appeal (*R. v. McCrimmon*, 2010 SCC 36) also challenged the voluntariness of his statement before both the trial judge and the Court of Appeal. Both courts concluded that his statement was voluntary.

[184] With respect, the suggestion of the Chief Justice and Charron J. that our residual concerns can be *meaningfully* addressed by way of the confessions rule thus ignores what we have learned about the dynamics of custodial interrogations and renders pathetically anaemic the entrenched constitutional rights to counsel and to silence.

[185] More broadly, however, the majority opinions in both *Singh* and this case project a view of the right to silence that hinges too closely on the voluntariness of a detainee's inculpatory statement. This approach ignores the fact that the right to silence can be breached in a manner other than the taking by the police of an involuntary statement. As Professor Stewart has observed, "[t]he right to silence can be violated when the police improperly persuade the accused to speak, but without any inducement or other factor that would make the ensuing statement involuntary" (p. 539).

[186] In our view, a denial of the right to consult counsel, which has the effect of forcing a detainee to participate in the interrogation until confession, coupled with the explicit belief on the part of the police that they are entitled to that confession, has precisely that effect.

[187] And yet this is not the most troubling consequence of the approach adopted by the Chief Justice and Charron J.

[188] The majority held in *Singh* that detainees who have asserted their right to silence have no consequent right or power, under either the common law or the *Charter*, to prevent the police from relentlessly pursuing their custodial interrogation. It therefore follows, in their view, that a detainee cannot be allowed to achieve the same result simply by asserting their s. 10(*b*) right to counsel. They ground this conclusion in a belief that detainees have

an obligation to participate in the investigation against them (reasons of the Chief Justice and Charron J., at paras. 57-58).

[189] We rejected this view in *Singh* and feel bound again to do so here. The objections we expressed in *Singh* apply with no less force to the s. 10(*b*) right to counsel.

[190] The majority's conclusion in *Singh* that a detainee cannot use the s. 7 right to silence to cease a custodial interview, and the view of the Chief Justice and Charron J. in this case that a detainee cannot use s. 10(*b*) in this same fashion, in effect creates a new right on the part of the police to the unfettered and continuing access to the detainee, for the purposes of conducting a custodial interview to the point of confession. The clear result is that custodial detainees cannot exercise their constitutional rights in order to prevent their participation in the investigation against them.

[191] We note that this expansion of police powers occurs at the expense of *Charter* rights. More importantly, it is being accomplished without subjecting the potential police power to the rigours of the s. 1 justification process, or even the *Waterfield/Dedman* test for the recognition of police powers at common law *(R. v. Waterfield*, [1963] 3 ALL E.R. 659 (C.C.A.), and *Dedman v. The Queen*, [1985] 2 S.C.R. 2). What is more, "this kind of judicial intervention would pre-empt any serious *Charter* review of the limits, as the limits would arise out of initiatives of the courts themselves" (*R. v. Orbanski*, 2005 SCC 37, [2005] 2 S.C.R. 3, at para. 81 (*per* LeBel J., Fish J. concurring). Indeed, the Chief Justice and

Charron J. subject the limits they impose on s. 10(*b*) to no legal or constitutional scrutiny whatsoever.

[192] Members of this Court have, in recent years, repeatedly questioned the practice of expanding the scope of police powers by judicial fiat (see, for example, *R. v. Clayton*, 2007 SCC 32, [2007] 2 S.C.R. 725 (*per* Binnie J., LeBel and Fish JJ. concurring), *Orbanski*; *R. v. Kang-Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456, (*per* LeBel J., Fish, Abella and Charron JJ. concurring). The common thread linking these opinions is a concern that "while *Charter* rights relating to the criminal justice system were developed by the common law, the common law would now be used to trump and restrict them" (*Orbanski*, at para. 70).

[193] These concerns have been echoed by appellate courts, as exemplified by the following passage from the concurring reasons of Jackson J.A. in *R. v. Yeh*, 2009 SKCA 112, 337 Sask. R. 1, at para. 147:

> It also goes, almost without saying, that an expansion of police powers, by judicial decision alone, precludes any future *Charter* scrutiny of the increased power, and <u>is inconsistent with the usual tenor of the evolution of the common law, which traditionally defends civil liberties and does not infringe them, without cogent evidence of the need to do so</u>. [Emphasis added.]

We agree.

[194] We do not question the authority of the courts to expand, narrowly and only when proven necessary, the scope of police powers. However, we insist that this authority

be exercised explicitly, only in the face of clear evidence of the need to do so, and in a manner that is shown to be constitutionally compliant upon a rigorous s. 1 analysis.

[195] In the view of the Chief Justice and Charron J., it is important to preserve the ability of the police to properly *investigate crimes*, and to use interrogation as an *investigative technique*. As the *Singh* majority held, custodial suspects are not immune from the reach of the police:

> What the common law recognizes is the individual's right to remain silent. This does not mean, however, that a person has the right not to be spoken to by state authorities. The importance of police questioning in the fulfilment of their investigative role cannot be doubted. One can readily appreciate that the police could hardly investigate crime without putting questions to persons from whom it is thought that useful information may be obtained. The person suspected of having committed the crime being investigated is no exception. Indeed, if the suspect in fact committed the crime, he or she is likely the person who has the most information to offer about the incident. Therefore, the common law also recognizes the importance of police interrogation in the investigation of crime. [Emphasis added; emphasis in original deleted; para. 28.]

The suspect in a criminal investigation is to be valued as an important, if not "fruitful", source of information (*Singh*, at para. 45).

[196] Based primarily on a belief in the need to balance the s. 10(*b*) right against the public interest in investigating and solving crimes, in addition to the perceived practical difficulties associated with exercising the right to the ongoing assistance of counsel, the position of the Chief Justice and Charron J., in essence, would therefore limit the right to

consult with counsel to circumstances where some form of material or substantial change in jeopardy has occurred and the detainee has demonstrated it to the satisfaction of his interrogators. Otherwise, the ability of the police to investigate crimes would, in their view, be unduly frustrated and the administration of justice would, they say, grind to a halt.

[197] We note again that none of these purported justifications were put through the rigour of a s. 1 analysis, and are based on nothing more than speculation. We emphasize the absence of any evidence to support the notion that allowing detainees to consult with their counsel during the course of a lengthy custodial interview "would have a 'devastating impact' on criminal investigations anywhere in this country" nor that it would restrain the ambit of police questioning (*Singh*, at para. 88). We echo the comments of our colleague Binnie J. in *Clayton*, equally applicable here, that the approach of the Chief Justice and Charron J. "can only add to the problematic elasticity of common law police powers, and sidestep the real policy debate in which competing individual and societal interests are required to be clearly articulated in the established framework of *Charter* analysis" (para. 61).

[198] Concerns similar to those expressed by our colleagues were also expressed some fifty years ago in the United States, prior to and after the judgement of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436 (1966). Critics argued that if detainees could insist on having their lawyers present during their interrogations, the police would no longer be able to obtain confessions, thereby hindering their ability to solve crimes and

secure convictions.

[199] Five decades of empirical research have determined that those early fears were unfounded. Studies addressing the impact of *Miranda* have generally suggested that: (1) police officers began complying with *Miranda* immediately after it became law; (2) *Miranda* has not reduced the percentage of admissions and confessions made to officers; and (3) *Miranda* has not decreased the percentage of charges laid by prosecutors or their success in prosecuting cases. See, for example, Evelle J. Younger, "Results of a Survey Conducted in the District Attorney's Office of Los Angeles County Regarding the Effect of the Miranda Decision upon the Prosecution of Felony Cases" (1966-1967), 5 *Am. Crim. L.Q.* 32; Stephen J. Schulhofer, "*Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs" (1996), 90 *Nw. U.L. Rev.* 500, at p. 547.

[200] Those early findings have remained essentially undisturbed. The consensus, save a few dissenting voices, is that *Miranda*'s effect on both the rates of confession and conviction has been negligible. The rate of confession has remained relatively stable, with only a small (one to two percent) drop post-*Miranda*. Similarly, in a recent large-scale study, Prof. Schulhofer concluded that "[f]or all practical purposes, *Miranda*'s empirically detectable net damage to law enforcement is zero" (p. 547). None of the commentaries referenced by our colleagues contradict these findings. Indeed, two of the mentioned authors find that *Miranda* has inadequately achieved its intended protection of defendants subjected to custodial interrogation. As Ronald J. Allen explains:

> If the atmosphere of the jail house is so compelling, if it is powerful enough to overbear the will to compel confessions to serious felonies by even innocent people, why will it not compel waivers of the abstract legal rights contained in the *Miranda* warnings? In the absence of an explanation of such matters, one would predict exactly what close to forty years of experience have demonstrated, which is that *Miranda* did not make much of a difference.
>
> ("*Miranda*'s Hollow Core" (2006) 100, *Nw. U. L. Rev.* 71, at p. 76)

See also Charles D. Weisselberg, "Mourning *Miranda*" (2008), 96 *Cal. L. Rev.* 1519.

[201] In concluding that the police conduct in this case violated the appellant's s. 10(*b*) right to counsel, we take care to make perfectly clear that we are not advocating the adoption of the American rules under *Miranda*. Our purpose here is simply to emphasize that our colleagues' fear that the administration of criminal justice would grind to a halt should custodial detainees be given greater access to counsel is not supported by the experience in jurisdictions where that very right is in place. And while the appellant did urge us to find that counsel are entitled to be present during custodial interrogations, there is no need for us to do so: Our conclusions rest entirely on the constitutional guarantee of meaningful and effective access to counsel enshrined in s. 10(*b*) of the *Charter*.

[202] In our respectful view, the right against self-incrimination and the right to silence cannot be eroded by an approach to criminal investigations, and in particular to custodial interrogation, that would favour perceived police efficiency at the expense of constitutionally protected rights. It is certain that police interrogation is not of itself a breach of the *Charter*, but the needs of police efficacy do not rank higher than the requirements of the *Charter*. We

agree with Professor Stewart that the *Charter* places minimum demands on investigative techniques:

> Since the principle against self-incrimination is part of the structure of a rights-based system of criminal justice, whatever minimum demands it places on investigative techniques have to be respected. Any system of justice that takes the dignity and worth of the individual seriously must uphold some version of the principle against self-incrimination. [p. 524]

[203] With respect, we find it difficult to reconcile the view that the right against self-incrimination ought to be ardently defended, with the suggestion that suspects who decide to exercise their right to consult with counsel, in order to meaningfully exercise their right to silence, must nevertheless endure persistent and sustained custodial interrogation. In our view, the approach of the Chief Justice and Charron J. does not pass constitutional muster.

[204] Accordingly, we are concerned lest the reasons of the Chief Justice and Charron J. be taken to have constitutionalized a police right to the uninterrupted interrogation of detainees to the point of confession. The police are not empowered by the common law or by statute, and still less by our Constitution, to prevent or undermine the effective exercise by detainees of either their right to silence or their right to counsel, or to compel them against their clearly expressed wishes to participate in *interrogations until confession*. Indeed, "[i]f the exercise of this right is a threat to our system of justice, then our system of justice, not the right to counsel, should be openly and honestly questioned" (*R. v. Charron* (1990), 57 C.C.C. (3d) 248 (Que. C.A.), at p. 254 (*per* Fish J.A., as he then was).

IV. Application

A. *The Breach of Section 10(b)*

[205] Having outlined our view of the purpose and scope of s. 10(*b*), we turn now to the application of this right to the present appeal.

[206] Prior to his interrogation, Mr. Sinclair had two brief conversations with his lawyer, each lasting no more than three minutes. Some eight hours later, his interrogation began. Throughout the course of the custodial interrogation, Sgt. Skrine was consistent in his denial of Mr. Sinclair`s requests to consult with counsel.

[207] Mr. Sinclair requested either to consult with his lawyer or to have his lawyer present no less than six times throughout the interrogation. Each request coincided with either the presentation of incriminating evidence, both real and invented, or a direct accusation on the part of Sgt. Skrine. And in each instance, Sgt. Skrine either rebuffed the request explicitly, or simply ignored it and continued his relentless questioning.

[208] Importantly, several of Mr. Sinclair's requests for counsel were coupled with firm assertions of his right to silence. For example, at the outset of the session, Mr. Sinclair declared, "I'm not saying anything or talking about anything that's until my lawyer's around

and he tells me what's going on and stuff" (A.R., at p. 542 (emphasis added)).

[209] Perhaps more troubling is the extent to which Sgt. Skrine believed he was entitled to Mr. Sinclair's confession. In his eyes, Mr. Sinclair's lack of cooperation — in other words his refusal to confess — meant that he was treating his interrogation like nothing more than a "game":

> Sinclair: I hear what you're saying, I got nothing to nothing to say right now. You're playing with my mind.
>
> Skrine: You know what Trent? This is not a game.
>
> ...
>
> There are a number of people's lives here that are entirely affected by what you do, including yourself. Now you've got to summon the courage up to look yourself in that mirror and you decide what person you be, Trent. This is not a game. And shame on you for turning it into a game.
>
> Sinclair: Not trying to turn anything into a game.
>
> Skrine: Good. 'Cause Gary GRICE was a human being and he has people that love him and you have people that love you that are affected by what you've done. You have made decisions in a state that only you can tell me or make me understand. You have made decisions that have affected all these people. You now hold decisions in your hand that affect all those people. This does not go away. You think about that. None of this goes away.
>
> (Door opens and closes as Sgt. SKRINE exits the room).
>
> (Door opens and closes as Sgt. SKRINE re-enters the room).
>
> Skrine: I had to take a breather, Trent 'cause you know I leave here and I'm just thinking, obviously I'm not doing a very good job here. You know. Maybe I'm not doing a good enough job because I'll tell ya,

> the decision is that obvious. Like what are you thinking there right now? What are you thinking? What's goin through your head? [Emphasis added; A.R., at p. 615.]

[210] He suggests that it would be a "mistake" for Mr. Sinclair to continue to exercise his right to silence:

> Skrine: No. Trent, okay, we're not gonna play semantics here. I don't want you to lie to me. We're past that. You did. All right? The evidence is overwhelming. Trent and at the end of the day I do not want you to continue to make mistakes. You have made a mistake. [A.R., at p. 594]

[211] As this Court held in *R. v. Hebert*, [1990] 2 S.C.R. 151, at p. 180, if a detainee asserts his or her right to silence and chooses not to speak, "the state is not entitled to use its superior power to override the suspect's will and negate his or her choice". In our view, Sgt. Skrine did just that.

[212] As we have explained, both a straightforward reading and a purposive interpretation of s. 10(*b*) lend themselves to a broad conception of the right to counsel. The guarantee of *l'assistance d'un avocat* means more than a one-time consultation with counsel, specifically when the brief consultation is followed by a lengthy interrogation, conducted by a skilled and experienced police interrogator.

[213] Accordingly, the police's failure to suspend the interrogation and allow Mr. Sinclair to consult with counsel, in the face of his numerous requests, constituted a

breach of his right to counsel, guaranteed by s. 10(*b*) of the *Charter*.

[214] However, we must also consider whether the incriminating statements made by Mr. Sinclair to the undercover officer, posing as a fellow inmate, and his participation in a re-enactment of the murder, were also obtained in violation of the *Charter*.

[215] The Court recently considered the issue of statements made subsequent to a *Charter* breach in *R. v. Wittwer*, 2008 SCC 33, [2008] 2 S.C.R. 235. In *Wittwer*, the test for admissibility was expressed in the following terms (para. 21):

> In considering whether a statement is tainted by an earlier *Charter* breach, the courts have adopted a purposive and generous approach. It is unnecessary to establish a strict causal relationship between the breach and the subsequent statement. The statement will be tainted if the breach and the impugned statement can be said to be part of the same transaction or course of conduct: *R. v. Strachan*, [1988] 2 S.C.R. 980, at p. 1005. The required connection between the breach and the subsequent statement may be "temporal, contextual, causal or a combination of the three": *R. v. Plaha* (2004), 189 O.A.C. 376, at para. 45. A connection that is merely "remote" or "tenuous" will not suffice: *R. v. Goldhart*, [1996] 2 S.C.R. 463, at para. 40; *Plaha*, at para. 45.

[216] Like ripples in a pond, Mr. Sinclair's original confession to Sgt. Skrine had far-reaching implications. In our view, both Mr. Sinclair's statement to the undercover officer and his participation in the re-enactment were inextricably linked to his original confession. In fact, Mr. Sinclair said as much to his "cellmate" before confessing to the murder: "They've got me, the body, the sheets, the blood, the fibres on the carpet, witnesses. I'm

going away for a long time but I feel relieved."

[217] We therefore find that both the subsequent confession and the re-enactment were obtained in violation of s. 10(*b*) as well.

B. *The Remedy: Section 24(2) of the Charter*

[218] Finally, having found a *Charter* breach, we must now turn to the question of remedy. The appellant asks that the evidence obtained as a result of the breach be excluded pursuant to s. 24(2) of the *Charter*.

[219] The test for exclusion of evidence under s. 24(2) was recently refined and restated in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, and *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494. As the Court explained, when determining whether the admission of evidence would bring the administration of justice into disrepute, three factors must be weighed:

(1) the seriousness of the *Charter*-infringing state conduct;

(2) the impact of the breach on the *Charter*-protected interests of the accused; and

(3) society's interest in the adjudication of the case on its merits.

[220] First, we note the type of evidence at issue — an incriminatory statement obtained in breach of the *Charter*. As the Court held in *Grant*, although there is no blanket rule for *Charter*-infringing statements, the admission of such evidence tends to bring the administration of justice into disrepute (paras. 90-92). Nevertheless, even in the context of incriminatory statements, all three factors must be examined.

[221] Bearing that in mind, we turn first to the seriousness of the state conduct. We believe that the violation of Mr. Sinclair's constitutionally guaranteed right to counsel was significant, and not merely a technical breach. However, we recognize that Sgt. Skrine was acting in good faith, in accordance with the law as he (and other courts, for that matter) understood it. At trial, he was candid about his understanding of the law:

> ... without inquiring further to determine whether or not he was confused about the advice he received, or if I got that feeling through his conversation, or if we had some sort of change in jeopardy as we talked through here, I wouldn't have necessarily automatically provided that phone call. I believed that we had met his rights. We had met our obligation at this time. [A.R., at p. 337]

[222] Sgt. Skrine's view of the law was not unjustified, given the undeveloped jurisprudence in this area. His denial of Mr. Sinclair's request for counsel was not malicious or otherwise motivated by bad faith.

[223] The second factor, however, strongly militates in favour of exclusion of the incriminating statements. It is almost impossible to imagine a case where a *Charter* breach

would have a greater impact on the protected interests of an individual. At a time when his freedom hung in the balance, Mr. Sinclair was denied access to the legal counsel that he desperately required.

[224] As a direct result of this unconstitutional deprivation, Mr. Sinclair relented in the face of unrelenting questioning and incriminated himself. Had he been provided with an opportunity to consult counsel, the outcome would likely have been very different. The impact of the breach, therefore, struck at the core of our most cherished legal protections: the right to silence and the protection against self-incrimination.

[225] Finally, we consider society's interest in the adjudication of the case on its merits. The offence at issue here — murder — is of the utmost severity. So too, however, is the right being protected. While society has an interest in the adjudication of a case on its merits, sometimes, as is the case here, that interest will be outweighed by the protection of the most fundamental rights in the criminal justice system. The right to counsel guarantees and safeguards the effective exercise of the legal rights that ensure the fairness of our criminal process.

[226] Accordingly, we would exclude the evidence pursuant to s. 24(2) of the *Charter*.

V. Conclusion

[227] For all of these reasons, we would allow the appeal, set aside the appellant's

conviction and order a new trial.

Appeal dismissed, BINNIE, LEBEL, FISH *and* ABELLA JJ. *dissenting.*

Solicitor for the appellant: Gil D. McKinnon, Q.C., Vancouver.

Solicitor for the respondent: Attorney General of British Columbia, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Director of Public Prosecutions of Canada: Public Prosecution Service of Canada, Winnipeg.

Solicitors for the intervener the Criminal Lawyers' Association of Ontario: Schreck & Greene, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association: McCarthy Tétrault, Vancouver.

Solicitors for the intervener the Canadian Civil Liberties Association: McCarthy Tétrault, Toronto.